Mr Justice Miller

# SUPREME COURT OF THE UNITED STATES.

No. ~~877.~~ 231.

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. THE BANK OF COMMERCE IN NEW YORK, PL'FFS IN ERROR,

vs.

THE COMMISSIONERS OF TAXES AND ASSESSMENTS FOR THE CITY AND COUNTY OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

GOVERNMENT PRINTING OFFICE.

Affirmed. Nelson

909

# SUPREME COURT OF THE UNITED STATES.

## No. 377.

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. THE BANK OF COMMERCE IN NEW YORK, PL'FFS IN ERROR,

vs.

THE COMMISSIONERS OF TAXES AND ASSESSMENTS FOR THE CITY AND COUNTY OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the court of appeals of the State of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you, or some of you, between the people of the State of New York, on the relation of the Bank of Commerce, in New York, against the Commissioners of Taxes and Assessments for the city and county of New York, a manifest error hath happened to the great damage of the said relators, the Bank of Commerce, in New York, as is said, and as appears by their complaint: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, the first Monday [SEAL.] of December, in the year of our Lord one thousand eight hundred and sixty-three and of the independence of the United States the eighty-eighth.

KENNETH G. WHITE,
*Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.*

2 March 26, '64.—Allowed.

S. NELSON.

Filed April 2, 1864.

3 The answer of the judges of the court of appeals of the State of New York in the within writ named doth certify, [SEAL.] under the seal of our said court, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, and send the record whereof mention in said writ is made, with all things touching or in anywise concerning the same, as appears in a certain schedule to this writ annexed, as within it is commanded.

By the court.

.COR'S TEN BROECK, *Dep. Cl'k.*

4 Pleas before the justices of the supreme court, at the City Hall, in the city of New York, at a general term thereof, held on the 1st day of July, 1863.

Present: Hon. Josiah Sutherland, P. J., Hon. William H. Leonard, and Hon. William F. Allen, associate justices.

STATE OF NEW YORK, *ss:*

The people of the State of New York sent to the comissioners of taxes and assessments for the city and county of New York their writ of *certiorari* close in these words, viz:

{ Rev. Stamp, 50 cents. } *Certiorari.*

[L. S.]

The people of the State of New York to the board of commissioners of taxes and assessments of the city and county of New York, greeting:

We being willing, for certain causes, to be certified of the proceedings, decision, and action had by and before you in the matter of the assessment for taxation of the Bank of Commerce of New York, by you lately made, do command you that all and singular the said assessment made by you for the year 1863, and all and singular the documents and papers relating thereto, and your decision and action thereon, and the statement, affidavits, and protest presented to you by said bank, with all things touching or concerning the said assessment, as fully and entirely as the same remain before you,
5 you send to our supreme court of judicature at the City Hall, in the city of New York, on the first day of July next, together with this writ, to the end that your decision and action in the matter of said assessment may be reviewed and corrected on the merits by our said court, and that we may further cause to be done thereupon what of right shall be fit to be done.

Witness Hon. Josiah Sutherland, presiding justice of our said court, at the City Hall, in the city of New York, the 30th day of June, A. D. 1863.

BENJAMIN D. SILLIMAN,
*Petitioners' Attorney, 43 Wall Street, New York.*

Which said writ was granted and issued upon the petition of the relators therein named, which petition and the papers therein referred to, and thereto and to said writ annexed, are as follows, that is to say:

*Petition for certiorari.*

To the supreme court of the State of New York:

The petition of the Bank of Commerce, in New York, respectfully shows that your petitioners are a banking association, formed and existing under and by virtue of the general statutes of this State to

authorize the business of banking, and that they carry on the banking business in the city of New York.

That the deputy tax commissioners of the city and county of New York entered in the annual record of assessed valuation of real and personal estate for the present year, 1863, the said association as holding taxable personal property to the amount of $9,200,000; that the said record came to the hands of the board of commissioners of taxes and assessments for the city and county of New York on the 12th day of January, 1863; that your petitioners being about to make the annual statement and affidavit required from banking associa-
6 tions by said board, they were directed by said board to make up such statements as of January 12, 1863, the day when said record came to the hands of said board; that your petitioners thereupon made and executed the statement and affidavit, of which a copy is hereto annexed, and made a part of this petition, and marked Schedule A, and on the 24th day of April, 1863, presented the same, together with the affidavit, of which a copy is hereto annexed, marked B, to the said board of commissioners; that afterwards, on the 22d day of June, 1863, your petitioners were notified by said board of commissioners that said board had entered said association in the assessment roll as assessed for $8,821,105 of personal estate, of the notice whereof, received on the said 22d day of June, a copy is hereto annexed, marked Schedule C; that your petitioners thereupon made objection to said assessment on the ground that the capital and personal estate of said association invested in stocks, bonds, and securities of the United States was exempt from such assessment, and your petitioners, on the 27th day of June, 1863, presented to the said board of commissioners a protest and objection in writing, of which a copy is hereto annexed, and made a part of this petition, and marked Schedule D; that your petitioners have been, and are at all times, ready and willing, and have offered to produce their president, cashier, and representative before the said board of commissioners, to be examined under oath touching the estate and property of said association; but that the said board of commissioners have overruled all the said objections of your petitioners, and decided to retain the assessment of said association at $8,821,105 of personal estate on the alleged ground that the said association is taxable upon the amount of its capital, although the same is invested wholly in stocks, bonds, and other securities of the United States.

That all and singular the matters and things in said statement and affidavit contained are true, and that the whole capital of said association now is, and was at the date of said statement and affidavits, invested in stock, bonds, and other securities of the United States, owned and held by said association.

That your petitioners are aggrieved by the aforesaid action
7 and decision of said board of commissioners in assessing said association at $8,821,105 of personal property, and allege that the same are erroneous, and that said association ought not to be assessed for any amount of personal estate, but is exempt by law from assessment and taxation on the stocks, bonds, and other securities of the United States in said statement and affidavits mentioned.

Your petitioners therefore pray that a writ of certiorari may be issued and allowed by this court, directed to said board of commissioners, commanding them to certify and return to this court all and singular their proceedings in the premises, and all and singular the documents, records, and papers before them touching or concerning the same, and that the said decision and action of said board of commissioners may be reviewed and corrected on the merits by this court, and that the aforesaid errors of said board of commissioners may be corrected according to law, or that your petitioners may have such other or further relief in the premises as may be meet.

And your petitioners will ever pray, &c.

For Bank of Commerce, in New York,

H. F. VAIL, *Cashier.*
BENJ. D. SILLIMAN,
*Att'y for Relators, Pl'ffs.*

CITY AND COUNTY OF NEW YORK, *ss:*

Henry F. Vail, being sworn, says that he is the cashier of the Bank of Commerce, in New York, above named, and that the foregoing petition is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believesit to be true.

HENRY F. VAIL,

Sworn to before me this 29th day of June, 1863.

THOS. P. OKIE, *Notary Public.*

{ U. S. Rev. Stamp, 5 cents. }

8

(Copy.)

A.

Statement made and delivered to the commissioners of taxes and assessments of the city and county of New York, for and in behalf of the Bank of Commerce, in New York, in pursuance of the provisions of title IV, chapter XIII, part 1, of the revised statutes of the State of New York, and of the acts amendatory thereof, chapter 654, laws of 1853, and chapters 456 and 536, laws of 1857.

1st. Real estate owned by the said Bank of Commerce, in New York, viz:

| | |
|---|---|
| Banking-house, and lot situated in the first ward of the city of New York. Sum actually paid therefor..... | $392,214 83 |
| 2d. Capital stock of the said Bank of Commerce, in New York, actually paid in and secured to be paid in.... | 9,234,320 00 |

Excepting therefrom:

| | |
|---|---|
| Paid for real estate, as above..... | 392,214 83 |
| Amount of the said capital stock held by the State..... } None. | |
| Amount of the capital stock held by various charitable and literary institutions, as per list hereto annexed—being incorporated institutions..... | 47,180 00 |

3d. Amount of surplus profits or reserved funds, exceeding ten per cent. of the capital above stated, } None.

This association holds and owns stocks, bonds, and other securities of the United States, to an amount exceeding its entire capital, and claims exemption from taxation on its capital.

The said association has no personal estate over and above the amount of debts due from said association, exclusive of stocks, bonds, and other securities of the United States, which are exempt from taxation by or under State authority.

The banking-house, office, or the place of transacting the financial business of the said Bank of Commerce, in New York, is situated in the first ward of the city of New York, at Nos. 27, 29 and 31 Nassau street.

Dated January 12, 1863.

9 CITY OF NEW YORK, *ss:*

I, Henry F. Vail, cashier of the Bank of Commerce, in New York, being duly affirmed, do hereby certify and declare that the foregoing statement is, and was at the date thereof, in all respects, just and true, to which date said statement is made, as required by the commissioners of taxes and assessments.

(Signed) HENRY F. VAIL.

Affirmed before me this 24th day of April, 1863.

RICHARD STACPOOLE,
*Notary Public.*

| | Shares. |
|---|---|
| R. Battell, Treasurer Norfolk Ecclesiastical Fund | 20 |
| Thos. Belknap, Treasurer Trinity College, Hartford | 60 |
| Brown University, Providence, R. I | 65 |
| Society of Cincinnati, N. Y. (scrip 14) | 14 |
| First Ecclesiastical Society, New Haven | 35 |
| German Mutual Assistance Society, N. Y | 10 |
| German Society of N. Y | 10 |
| New York House and School of Industry | 68 |
| New York Orphan Asylum Society | 65 |
| St. George's Society | 15 |
| Baptist Society, Essex, Conn. | 7 |
| Second Congregational Society, New London | 29 |
| First Ecclesiastical Society, Windham, Ct. | 10 |
| Yale College | 50 |
| Hill's Academy, Essex, Ct | 11 |
| Full | 469 |

And 14 scrip.

| | |
|---|---|
| 469 full shares, at $100 each | $46,900 |
| 14 scrip " " 20 " | 280 |
| | $47,180 |

10 (A.) B.

(Copy.)

CITY AND COUNTY OF NEW YORK, *ss:*

Henry F. Vail, cashier of Bank of Commerce, in New York, being duly sworn, says: That the said bank holds and owns, and held and owned on the 12th of January, 1863, stocks, bonds, and other securities of the United States, to an amount exceeding its entire capital, (which stocks, bonds, and other securities are exempt from taxation by or under State authority,) and that the total value of all other personal estate of said association does not, and did not at that date, exceed the amount of debts due from said association.

This deponent, therefore, on behalf of said association, and acting as its representative, respectfully claims and insists that said association has, and had at that date, no taxable personal estate, over and above the amounts of debts due from said association, after excluding its property which is exempt by law from taxation, and that no tax can by law be imposed or laid on said association, save as to its real estate.

(Signed) HENRY F. VAIL.

Sworn to before me this 24th day of April, 1863.

(Signed) RICHARD STACPOOLE,
*Notary Public.*

{Rev. Stamp, 5 cents.}

11 (A.) C.

OFFICE OF THE COMMISSIONERS OF TAXES AND ASSESSMENTS,
32 *Chambers street, (new court-house,) New York,* 1863.

To Henry F. Vail, cashier of the Bank of Commerce:

SIR: We beg leave to inform you that we have corrected the return of the Bank of Commerce, and have assessed the personal estate at ..... $8,821,105

| | | |
|---|---|---|
| Capital ..... | $9,234,320 | |
| Surplus ..... | | |
| Deducting therefrom for literary and charitable institutions ..... | 21,000 | |
| | $9,213,320 | |
| Do. cost of real estate ..... | 392,215 | |
| | | $8,821,105 |

The rolls will be returned to the board of supervisors on the first Monday of July next as corrected.

Respectfully,

A. J. WILLIAMSON,
J. W. ALLEN,
J. W. BROWN,
*Commissioners of Taxes and Assessments.*

(A.) D.

*Protest.*

To the board of commissioners of taxes and assessments of the city and county of New York:

GENTLEMEN: The Bank of Commerce hereby objects to the assessment of said bank at $8,821,105 of personal estate in the assessment roll of the year 1863, and claims that the same is erroneous.

12 Hereby referring to the statement dated January 12th, 1863, made and delivered to you by this bank on or about the 24th day of April, 1863, and to the affidavit of Henry F. Vail, cashier, made on the 24th day of April, 1863, and also delivered to you on or about that date, this bank claims that it is exempt from assessment and taxation, except on its real estate, because the whole amount of its capital stock is, and was at the dates of said statement, invested, as therein mentioned, in stocks, bonds, and other securities of the United States, and the total value of all other personal estate of said bank does not, and did not at those dates, exceed the amount of debts due from said bank.

Said bank, therefore, protests against the said assessment of said bank at $8,821,105, and respectfully requests your board to correct the said assessment roll by cancelling that assessment.

Said bank offers to produce before your board the president, cashier, and representatives of said bank for further examination, and touching said assessment and the matters hereinbefore mentioned and referred to.

Dated June 25th, 1863.

(Signed) H. F. VAIL, *Cashier.*
BENJ. D. SILLIMAN,
*Att'y for the Bank of Commerce, in New York.*

Let a writ issue pursuant to the prayer of the within petition.
June 30th, 1863.

J. SUTHERLAND, *Judge.*

At which day and place, in the return of said writ mentioned, before the justices mentioned, come the said The Bank of Commerce of New York, by Benjamin D. Silliman, their attorney, and the said The commissioners of taxes and assessments for the city and county of New York also come, by John E. Develin, their attorney, and now here make return to said writ in the words and figures following—that is to say:

*Return.*

13 To the supreme court of the State of New York:

We, the undersigned, commissioners of taxes and assessments for the city and county of New York, pursuant to a certain writ of certiorari delivered us, and hereto annexed, do certify and return—

That the deputy tax commissioners did, under our direction, as by law required, assess the actual value of the capital stock of the Bank of Commerce, in New York, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are liable to taxation upon the capital stock under the laws of this State, and amount of stock held by charitable and literary institutions, at the sum of 8,821,105 dollars, and that such assessed valuation was duly entered at detail in the books provided for that purpose, and kept in the office of the said commissioners, called "The Annual Record of the Assessed Valuation of Real and Personal Estate;" that notice of such assessment was given to said bank; that thereupon the officers of said bank did appear before us, and did complain of said assessment, and did present to us certain statements in writing, of which a true copy is annexed, marked A.

That, thereupon, we, the said commissioners, did examine into the said complaint, and in our judgment the said assessment was and is correct, and we determined that the actual value of the said capital stock, after making the aforesaid deductions, was 8,821,105 dollars, which we believed and now believe to be just, and such assessment stands in the said annual record of the assessed valuation of real and personal estate as an assessment for that amount against the said bank.

We further state that our decision thereon was declared, and such reduction made, within thirty days after the said application was made to us, as aforesaid, and prior to the first day of May, A.
14 D. 1863; that said assessment so made, and our action thereupon, were under and in pursuance of the several laws of the State of New York relating to the assessment and collection of taxes in the city and county of New York.

And we do further certify and return, that the said Bank of Commerce in New York is, and for several years last past has been a banking corporation, created under and by the laws of the State of New York, and not otherwise; and under and in pursuance of such laws enjoys, and has during all said time enjoyed certain privileges; and is and has been subject to certain burdens; and among other burdens is, and was at the time of such assessment, subject to assessment and taxation upon the value of its capital stock, without regard to the fact that such capital stock, or any portion of it, might be invested in the public stocks, debts, or bonds of the United States; and that such assessment was not made upon the public stocks or bonds of the United States, but was made, pursuant to the laws of said State of New York, upon the capital stock of said bank, estimated at its just value after making the exceptions and deductions required by the statutes of said State.

In testimony whereof, we, the said commissioners, have respectively to these presents subscribed our names and affixed our seals at the city of New York, this first day of July, 1863.

A. J. WILLIAMSON. [SEAL.]
J. W. ALLEN. [SEAL.]
J. W. BROWN. [SEAL.]

And because the said court, before the justices thereof now here, are not yet advised what judgment to give of and upon the premises, a day is given to the parties aforesaid, before the said justices of the supreme court aforesaid, on the 2d day of November, 1863.

At which day, before the justices aforesaid, at the general term of said court at the City Hall aforesaid, come the parties aforesaid, by their respective attorneys aforesaid. Whereupon, all and singular the premises being seen, and by the aforesaid court and justices thereof, now here, being fully understood, and mature deliberation being thereupon had, it seemeth to the said court, now here in
15 general term, before the aforesaid justices thereof, that the aforesaid decision and action of the commissioners of taxes and assessments for the city and county of New York should be in all respects affirmed and held valid; therefore it is considered and adjudged as follows—that is to say:

At a general term of the supreme court of the State of New York, held at the city of New York, on the 30th day of November, 1863,

Present: Hon. Josiah Sutherland, P. J.; Hon. Wm. H. Leonard, and Hon. Wm. F. Allen, justices.

THE PEOPLE, *ex rel.* The Bank of Commerce of New York,
*ag'st*
THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY AND COUNTY OF NEW YORK.

This matter having been brought to a hearing at a general term of this court, in the city of New York, on the 28th day of September, 1863, upon the petition, certiorari, and return thereto, and counsel for the relators, and for the board of commissioners of taxes and assessments of the city and county of New York, named in said petition, writ, and proceedings, having been heard, and the court having reviewed upon the merits the decision and action of said commissioners: now, on motion of John E. Develin, of counsel for said commissioners,

It is ordered, adjudged, and decreed, that the proceedings and determinations of the said commissioners in the assessment of the said relators be, and the same are hereby, in all respects affirmed and held valid; and it is further adjudged, that the said commissioners recover from the above-named relators their costs and disbursements, to be taxed by the clerk of the court.

16 And thereupon the costs of the said commissioners, respondents as aforesaid, are adjusted and taxed at the sum of $46 27, by the clerk of the said court.

Judgment signed December 22d, in the year one thousand eight hundred and sixty-three.

H. W. GENET, *Clerk.*

Endorsed: Filed December 22d, 1863, at 11 o'clock and 34 minutes.

N. Y. Supreme Court.

THE PEOPLE, *ex rel.* the Bank of Commerce in New York, appellants,
*agst.*
THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY AND COUNTY OF NEW YORK, respondents.
} Notice of Appellant.

Please take notice, that the plaintiff appeals to the court of appeals from the judgment, and all parts thereof, entered herein on the 16th day of December, 1863, upon the decision of the general term, affirming the proceedings and determinations of the said commissioners of taxes and assessments for the city and county of New York.

BENJ. D. SILLIMAN,
*Att'y for Relators, Appellants.*

To JOHN E. DEVELIN, Esq.,
*Att'y for Respondents.*

H. W. GENET,
*Clerk Supreme Court.*

17 STATE OF NEW YORK,
*City and County of New York, ss:*

I, Henry W. Genet, clerk of the city and county of New York, and clerk of the supreme court of said State, in and for said county, do certify that the preceding consists of certified copies of the notice of appeal, and of judgment roll, on file in my office.

In witness whereof, I have hereunto set my hand and affixed my [L. S.] official seal, this 22d day of December, A. D. 1863.

H. W. GENET, *Clerk.*

*City and County of New York, ss:*

Wm. A. Rice, being duly sworn, says that he is the managing clerk in the office of B. D. Silliman, esq., attorney for the appellant, on the appeal herein, and that no opinion in writing was given by the court, or by any justice thereof, at either special or general term, to the best of deponent's knowledge and belief.

WILLIAM A. RICE.

Sworn to before me, this 29th day of December, 1863.

JOHN F. DOYLE,
*Notary Public, New York County.*

{U. S. Inter. Rev. Stamp, 5 cents.}

18 Court of appeals.

THE PEOPLE OF THE STATE OF NEW YORK, on the relation of the Bank of Commerce in New York, appellants,
*against*
THE COMMISSIONERS OF TAXES AND ASSESSMENTS FOR THE CITY AND COUNTY OF NEW YORK, respondents.

The appeal in this cause having been argued by Mr. Daniel Lord, of counsel for the plaintiffs, appellants, and by Mr. James T. Brady and Mr. John Develin, of counsel for defendants, respondents, and due deliberation having been had thereon, it is ordered that so much of the judgment of the supreme court appealed from by the said plaintiffs, appellants, as awards costs to the defendants be, and the same is hereby reversed, and that the said judgment be, and the same is hereby, in all other respects, affirmed.

And the relators having claimed exemption under and by virtue of the second section of the act of Congress entitled "An act to authorize the issue of United States notes, and for the redemption or funding thereof, and for funding the floating debt of the United States," passed February 25th, 1862, and by virtue of the eighth section of the first article of the Constitution of the United States, from the
19 taxation mentioned in the record in this cause, on the ground that the amount of their capital stock in that respect, mentioned in said record, is invested in the public debt of the United States, and the validity of the authority claimed under the statute of the State of New York, entitled "An act in relation to the taxation of moneyed corporations and associations," passed April 29th, 1863, to impose the tax mentioned in the said record, being drawn in question, it is certified that the judgment of this court is against the relators, against such exemption, and in favor of the validity of such authority.

A copy. COR'S TEN BROECK, *Dep. Cl'k.*

20 *Bond for costs on appeal to the Supreme Court of the United States.*

Supreme Court of the United States of America.

THE PEOPLE OF THE STATE OF NEW YORK, on the relation of the Bank of Commerce of New York,
*vs.*
THE COMMISSIONERS OF TAXES AND ASSESSMENTS FOR THE CITY AND COUNTY OF NEW YORK.
} Bond for costs.

Know all men by these presents, that we, Samuel C. Moore and John A. Stevens, of the city, county, and State of New York, are held and firmly bound unto the above-named defendants in the sum of five hundred dollars, to be paid to the said defendants, for the

payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and sixty-four.

Whereas the above-named relators have prosecuted their writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the court of appeals of the State of New York:

Now, therefore, the condition of this obligation is such, that if the above-named relators shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(S'g'd) SAMUEL C. MOORE. [L. S.]
(S'g'd) JNO. A. STEVENS. [L. S.]

Sealed and delivered, and taken and acknowledged, this 26th day of March, 1864, before me.

(S'g'd) J. BUCHANAN HENRY,
*U. S. Commissioner, S. D. N. Y.*

UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

Samuel C. Moore and John A. Stevens, being severally duly sworn, do depose and say, each for himself, that he is a freeholder in the city of New York, and that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

(S'g'd) JNO. A. STEVENS.
(S'g'd) SAM'L C. MOORE.

Sworn to this twenty-sixth day of March, A. D. 1864, before me.

(S'g'd) J. BUCHANAN HENRY,
*U. S. Com'r, S. D. N. Y.*

Allowed.
(Signed) S. NELSON.

Filed this 2d day of April, 1864.

Filed 5th April, 1864.

# Supreme Court of the United States.

DECEMBER TERM, 1864.

## THE COMMISSIONER OF TAXES, &c.,

DEFENDANTS IN ERROR,

*VS.*

## THE PEOPLE OF THE STATE OF NEW YORK, &c.,

PLAINTIFFS IN ERROR,

POINTS FOR DEFENDANTS IN ERROR IN THIS AND OTHER CASES CALLED "THE TAX CASES."

McGILL & WITHEROW, Printers, Washington, D. C.

# Supreme Court of the United States.

DECEMBER TERM, 1864.

---

THE COMMISSIONERS OF TAXES, &c.,

DEFENDANTS IN ERROR,

*ads.*

THE PEOPLE OF THE STATE OF NEW YORK, &c.,

PLAINTIFFS IN ERROR.

---

JOHN E. DEVELIN,
*Counsel to the Corporation of the City of New York.*

JAMES T. BRADY,
FRANCIS KERNAN,
*Of Counsel for Defendants in Error.*

---

WASHINGTON:
PRINTED BY McGILL & WITHEROW
1865.

THE COMMISSIONERS OF TAXES, &c., DEFENDANTS IN ERROR,

*ads.*

THE PEOPLE OF THE STATE OF NEW YORK, &c.,

PLAINTIFFS IN ERROR.

---

POINTS FOR DEFENDANTS IN ERROR IN THIS AND OTHER CASES, CALLED "THE TAX CASES."

*First.* There is no jurisdiction in this Court over any of the cases at bar. No question arises in either of them under the Constitution of the United States. Their decision exclusively depended, in the Court of Appeals of New York, upon the constitution and legislation of that State.

*Martin* vs. *Hunter's Lessees*, 1 *Wheaton*, 304.
*Miller* vs. *Nichols*, 4 *Wheaton*, 311.
*Commercial Bank, &c.*, vs. *Buckingham's Executors*, 5 *Howard*, 317.
*Menard* vs. *Aspasia*, 5 *Peters*, 505.

*Second.* If the Court entertain the cases, we then submit that the only question legitimately presented in these cases is, whether the State had the *power* to pass the act of 1863, under which the tax has been levied.

1st. The authority of the State to tax is one which, as Chief Justice Marshall said in *Weston* vs. *The City of Charleston*, (2 Peters, 449,) "is a right which, in its nature, acknowledges no limits." In *McCullough* vs. *The Bank of Maryland*, (4 Wheaton, 425,) the Chief Justice says that the principle controling the decision in that case is one which leaves the power of taxing the people and property of a State unimpaired, which leaves to a State the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the Government of the Union, and all

those means which are given for the purpose of carrying those powers into execution.

Mr. Justice Nelson, giving the opinion of this court when the tax cases were before it, in December, 1862, speaking of the respective powers of the National and State governments in regard to taxation, says: "Each is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or the functions exercised; and influenced by a public and patriotic spirit on both sides, a conflict of authorities need not occur or be feared."

The constitution of the State of New York contains "no provision which declares that taxes shall be assessed equally and according to value upon all the property of the citizens of the State," nor any other limitation.

2d. The former cases in this court rested on the New York statute of 1857, which provided that, "instead of taxing the nominal capital expressed by the words capital paid in or secured to be paid in, the officers were required to assess the capital stock *at its actual value.*" (See opinion of Denio, presiding judge of Court of Appeals, in the present cases, pages 16, 7.

Before the act of 1857, and under the revised statutes of New York, "it was *immaterial as to the character or description of property which constituted the capital, as the tax imposed was wholly irrespective of it.* The tax was *like* one *annexed to the franchise*, as a royalty for the grant." Such is the language of *Judge Nelson* in the former cases, and he adds, alluding to the effect of the law of 1857: "But since *the change of the system*, it is agreed the tax is *on the property* constituting the capital."

3d. The decision in this Court is, therefore, to the effect that if the tax had been laid under the system established by the Revised Statutes, it would have been valid, although the bank capital was made up wholly, or in part, of Government securities of the United States.

4th. In viewof this decision, the Legislature of New York passed the act of 1863, which provides that banks, and all monied corporations, &c., "shall be liable to a taxation on *a valuation* equal to the amount of their capital stock *paid in, or secured to be paid in.*" The plaintiff in error contended in the State courts that this law meant that the taxation should be applied to the capital stock which a corporation *owned or used in its business*, and that the tax was intended to be, not

on an "ideal thing," but upon the "*property*" of the corporation.

Such was the view of Mr. Justice Mullen, who gave a dissenting opinion in the Court of Appeals. But that Court held otherwise, and declared that "The system established by the act of 1857 was *abolished* by the act of 1863, and was *superseded* by the arrangements of that act;" that it was a "return substantially, and, so far as *this question* is concerned, *exactly* to the system of the Revised Statutes," affixing the tax to the "nominal capital."

See Judge Denio's opinion, p. 7.

If this be so, then the decision in this Court, and that of the New York tribunal, both sustain the validity of the taxation in question. An examination of the first two paragraphs in Judge Nelson's opinion conclusively establishes this proposition.

*Third.* This Court will not review the decision of the Court of Appeals on the *construction* of the law of 1863. That decision declares that the State has imposed the tax on the "nominal capital," as was done by the Revised Statutes, and this Court has adjudged that in such case the tax may be laid, like one annexed to the franchise, as a royalty for the grant. The tax in question is therefore valid.

The numerous cases appropriate to this point are collected in Holcombe's Digest, pp. 248, 249.
*Williams* vs. *Norris*, 12 *Wheaton*, 117.

*Fourth.* If by any possibility the construction of the act of 1863 should be considered in this Court, we submit that ours is the correct interpretation of that act, for the reasons already stated by Judge Denio in his very able opinion, which we deem it unnecessary here to set forth, and to which, we respectfully submit, that nothing need be added.

It was said in the courts below that the act of 1863 was "a premeditated evasion" of the judgment of this Court. On the contrary, it was legislation in conformity with the judgment of this Court, as we have already shown.

Besides, as Judge Denio remarks: "The arrangements for State taxation are within the uncontrolable discretion of the Legislature, whose motives are not subject to the criticism of the courts."

*Fifth.* The State of New York has not attempted to render the national securities amenable to taxation. They en-

joy immunities under the Constitution, and the adjudications of this Court. But the State exercises its power to make monied corporations contribute, like natural persons, to the support of the Government whose protection they enjoy. This it has a right to do on any basis of assessment, however arbitrary, while acting within the sphere of its legislative control. If a monied corporation, the moment its capital is paid, can distribute its stock, and by investing the whole capital in Government securities escape entirely from taxation, it follows that, while it derives its existence from the State, it need contribute nothing to the maintenance of the State. And this is the more remarkable in view of the fact that by the Revised Statutes of New York, Part I, chapter 13, section 7, it is provided that "*The owner or holder of stock in any incorporated company liable to taxation on its capital shall not be taxed as an individual for such stock.*" This is still the law.

*Case of Providence Bank*, 4 *Peters, pages* 561, 562.
*State Bank of Ohio* vs. *Knoof*, 16 *Peters, page* 387.

*Sixth.* Other questions were involved in the arguments below, such as the time when the act of 1857 began to operate on the corporations, and whether the tax could properly be laid on corporations whose liabilities equal their capital, but we submit that these questions can not be investigated in this Court. If they should, we refer to Judge Denio's opinion in support of our case.

JOHN E. DEVELIN,
*Counsel to the Corporation of the City of New York.*
JAMES T. BRADY,
FRANCIS KERNAN,
*Of Counsel for Defendants in Error.*

Wm. C. Bryant & Co., Printers, 41 Nassau Street, cor. Liberty, N. Y.

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# Supreme Court

## OF THE UNITED STATES.

December Term—No. 231.

Bank of Commerce, Relators,
Plaintiffs in Error,

*against*

The Commissioners of Taxes of New York,
Defendants in Error.

### Statement of Relators.

1. The Tax Commissioners received, according to law, from the bank, a statement, under the oath of their cashier, of its real and personal estate (*fols.* 8, 9,) giving in detail the items required by law; and showing that the investment of its capital was in stocks, bonds, and securities of the United States, exempt from taxation.

2. The Commissioners, however, corrected (as they called it) the return of the bank, disallowing the exemption claimed of the investment in the United States securities; and they assessed the personal estate of the bank at a sum professedly including the investment in United States securities. (*Fols.* 13,14.)

3. The Bank, in due season, notified the Commissioners

of their protest against this assessment, and offered to produce their officers as witnesses to be examined touching the assesement. (*Fol.* 12.)

4. But the Tax Commissioners refused to vary the assessments on the ground that the personal estate of the Bank was to be assessed and taxed on the value of its capital stock, without regard to the investment of it, in whole or in part, in the public debt of the United States. (*Fol.* 13.)

The Bank thereupon brought a *certiorari*, according to the statute of New York, to which the Tax Commissioners made a return, showing the case as above stated. (*Fol.* 4, *Certiorari; fol.* 13, *Return.*)

6. On hearing, the Supreme Court disallowed the exemption claimed, and confirmed the action of the Tax Commissioners, and gave judgment accordingly. (*Fol.* 15.)

An appeal was taken from that judgment to the Court of Appeals.. (*Fol* 18.)

On this appeal, judgment was given by the Court of Appeals against the claim made by the relators, and in favor of the authority set up by the State, and against the exemption. (*Fol.* 19.)

A writ of Error was thereupon prosecuted to this Court. (*Fol.* 1.)

## General Remarks.

I. By the judgment of the Supreme Court of the United States (*The Bank of Commerce* vs. *The Tax Commissioners of New York*, 2 *Black. S. C. R.*, 620,) it was settled, that:

1. The debt of the United States was without the range of State taxation, and independent of it.

2. That this independence of State taxation appertained

to it, whether held by a corporation as a part of its corporate capital, or by an individual.

3. And this independence resulted from its being a means by which the United States held the money borrowed, and as such means, was protected as an exercise of one of its sovereign powers.

II. The system of taxation of personal property by the law of New York comprehends the following particulars:

1. All the personal estate liable to taxation is to be assessed by the Assessors (or Tax Commissioners) at its *actual value*, to be ascertained by the Assessors in the first instance, but subject to be reduced according to the affidavit of the party taxed.

2. The same rule of assessment according to the *actual value* of its capital stock is applicable to corporations other than monied corporations.

*N. Y. Laws of* 1857, *Ch.* 456, § 3.
*Oswego Starch Factory* vs. *Dolloway*, 21 *N. Y. Reports*, 449, (*in* 1860.)

3. Monied corporations, prior to 1857, were held liable to taxation on an assessment based on the amount of their *nominal capital*, paid or secured to be paid; not to be varied by showing that it was reduced by losses or increased by gains.

4. This was decided by the Court of Errors of New York in 1843, in *The Farmers' Loan, &c., Company* vs. *The Mayor, &c., of New York*, 7 *Hill. N. Y. R*, 261.

The discussion in this case (decided by a vote of 13 to 11) embraces a full view of the New York system up to that date.

See also 4 *Paige R.*, 399, *Bank of Utica* vs. *City of Utica, in* 1834.
*The People* vs. *The Supervisors of Niagara Co.*, 4 *Hill. R.*, 20, (*Dec.*, 1842, *in the Supreme Court.*)

5. All these decisions admit the principle, that the assessment on this basis was adopted as a *rule of convenience* in fixing the taxable amount, and as a rule of convenience merely. "It would have been a more "equitable and just rule to take the amount of capital "as it actually exists at the time of making the assess- "ment. But as this would involve an enquiry into "the private concerns of the corporations and the per- "sons dealing with them, and as it would be difficult, "if not impracticable, to arrive at a just result, the "Legislature has thought proper to adopt another "standard."

4 *Hill.*, 20; 4 *Paige*, 399; 7 *Hill.*, 261.

In all the discussions on this subject in the Courts of New York it was not controverted, that the principle was to adopt *actual value* as the general basis of the taxation; and that the adoption of *nominal amount* was merely for convenience and to avoid particular enquiries into transient changes. Always admitting also that legislative relief would be, and was, given where the difference should become great between *actual* and *nominal* valuation.

*See the Cases cited passim.*

6. In 1857, the law was altered and the shares of stock in all corporations, taxable on their stock were to be assessed on its *actual* value.

*Act of* 1857, *Ch.* 456, § 3.
21 *N. Y. Rep.*, 449.

Under this statute an assessment was made on shares at a premium of 75 per cent. above par.

7. In 1862, the question arose as to the rate of valuation of stock in monied corporations, as well as when embraced in the property of individuals, where part of the personal estate consisted of United States obligations. The State Courts held that such estate was taxable as part of the general personal estate. But, on a review of the question, it was held by the Supreme Court of New

York State, in a case where the taxation was by a general law, applicable to personal estate generally, the U. S. debt was to be included by the Assessors or Tax Commissioners. (See 23 *N. Y. Rep.*, 192, *Bank of Commonwealth.* This was afterwards overruled—2 *Black. R.*, 620, *in the Bank of Commerce* v. *Tax Commissioners.*)

8. On the establishing of the law on this subject of the U. S. debt by the Supreme Court of the United States, an act was immediately passed by the Legislature of New York:

§ 1. "All banks, banking associations, and other "monied corporations and associations shall be liable "to taxation on a *valuation* equal to the amount of "the capital stock paid in or secured to be paid in, "and their surplus earnings (less ten per cent. of such "surplus) in the manner now provided by law, de-"ducting the value of the real estate held by any such "corporation or association, and taxable as real estate.

§ 2. "This act shall take effect immediately."

*Acts of* 1863, *ch.* 240.

9. On this, the Court of Appeals of New York held, that the stock of the bank should be assessed at its *nominal or par value;* disregarding the independence from taxation of so much of their capital as was invested in U. S. obligations, and adopting the opinion, that by this statute the old rule was restored.

The opinions of the Judge, DENIO, and of Mr. Justice MULLEN, herewith submitted, show fully the opposing views of the Judges on this question.

The opinions of *Judge Denio* and *Judge Comstock*, in the case of the *Bank of Commerce*, 23 *N. Y. Reports*, 199, are also full exhibitions of this whole subject.

**First Point.**

1. The rule of assessment on the nominal value of stock was not adopted as a rule *intended* to tax non-existing or exempted personal estate, but simply was adopted as a *rule of convenience*, in order to avoid particular enquiries into a changing subject. It was never adopted as a rule intended to violate the independence of an exempted subject of taxation.

2. However general the terms of a law for assessment and valuation of stock, yet they must have reference to the subject, as being within or without the taxing power.

   While it may be proper to adopt a fixed rule as to a corporate body taxed on its property, which should not be changed by temporary increase or deficiency; yet it is wholly a different question to apply that fixed rule to property independent, by its very nature, of the taxing power.

   This question is not decided by any case anterior to the one now under review.

3. It was an error to suppose that, by restoring the old rule of assessment prior to 1857, a rule was created which comprehended U. S. debt, which never was within the old rule.

**Second.**—The rule of taxing capital stock which embraced United States debt, must be defended on the supposition that the mere *corporate capacity* was the subject of taxation, and not the *corporate property*.

The franchise itself is not separately taxed by the act in question; it is the franchise with a legal fixing of the assets or capital embraced in it; it is the corporate personal estate held under the franchise, and when this is shown to be without the taxing power it must be excluded from the valuation.

**Third.**

1. The corporate property, whether it shall be taxed by a specific and assumed or an actual valuation, cannot be concealed from the right of the United States to enjoy the immunity of its loans, which immunity enures to the holders of the loans, whatever be their character of corporate or private individuals; this immunity is the right and benefit of the United States.

2. The act of 1863 itself uses the term "*valuation*" equal, &c., &c. This imports corporate property valued, showing the tax to be intended to rest on the property at some valuation. But if it rests on the property at all, the independent or exempted property must not be included.

3. That the surplus of the accretion to the capital stock is taxable by the terms of the State law, shows that the assessment valuation is to embrace the corporate investments, and that they are to be enquired into by the assessors. But if the enquiry to ascertain this surplus shows the whole capital, and surplus also, if any, invested in United States debt, surely the surplus must not be taxed, but excluded from the valuation: and equally so if the clear capital be of the very same nature as the surplus, it must also stand free of taxation.

**Fourth.**—The tax act of 1863, if intended to evade the judgment of this Court, or to violate the immunity of the United States debt, is clearly void.

If not so intended, it must be limited to the case of the taxation on a nominal capital, where investments in the United States debt forms no part of it. And by such limited construction the assessment in question becomes erroneous.

**Fifth.**—The whole capital of the bank is invested in the United States debt, and the adjudication of the Tax Commissioners expressly disregards the immunity in every degree.

1. Of course no question can be made that the immunity was not disregarded. The averment of the bank is not controverted.

2. And by intendment of law, if necessary, the durable and permanent investment in United States debt must be regarded as an investment of capital, leaving the current deposits and collections of the bank to meet its current demands.

**Last.**—The judgment of the Court of Appeals must be reversed, and that Court must be ordered to enter a judgment of reversal and of quashing the assessment.

B. D. Silliman,
For the Bank of Commerce.
D. Lord,
Of Counsel.

# U. S. Supreme Court.

UNITED STATES SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* THE BANK OF THE COMMONWEALTH,
*Plaintiffs in error.*

*agst.*

THE COMMISSIONERS OF TAXES AND ASSESSMENTS FOR THE CITY AND COUNTY OF NEW YORK,
*Defendants in error.*

*Points for defendants in error.*

THE PEOPLE, *ex rel.* THE BANK OF COMMERCE,
*Plaintiffs in error,*

*agst.*

THE SAME,
*Defendants in error.*

The defendants in error are officers appointed under

Chapter 302 of the laws of the State of New York for the year 1859 to make out, from year to year, a list or or assessment roll, in which shall be inserted, among other items, the personal property subject to taxation in the City of New York, and also the names of the respective owners of such property. Sec. 9 of art. 2 of title 2 of ch. 13 of 1st part R. S.; 1. N. Y. R. S., p. 909, 5th ed.

In the performance of this duty, these defendants, prior to May 1st, 1863, inserted in such assessment rolls, for the year 1863, that the plaintiffs in error, the Bank of the Commonwealth, were liable to taxation on $561,900, being the sum stated by the said plaintiffs as the amount of their capital stock paid in, less the portion thereof invested in real estate (Er. book, ff. 21, 22), and that the plaintiffs in error, the Bank of Commerce, were liable to be taxed on the sum of $ , being the sum stated by them as the amount of their capital stock paid in, or secured to be paid in, less the part thereof invested in real estate.

Each of the plaintiffs in error claims that no amount whatever should, in either case, have been inserted in the assessment-rolls by the defendants in error, on the ground that these respective amounts were not liable to taxation, because they were at the time invested in the public stocks of the United States, which, by the Constitution and Laws of the United States, are exempt from taxation by State authority.

The plaintiffs in error are each Banking Corporations or associations incorporated, organized, and doing busi-

ness under and by virtue of the general banking laws of the State of New York, passed in 1838 (Ch. 260, of Laws of 1838), and laws supplementary thereto and amendatory thereof. (Er. b. ff., 8, 9, N. Y. R. S., Vol. 2., p. 551. 5th ed.)

In the year 1863, the Legislature of the State of New York enacted a law in the words following (Chap. 240, Laws 1863 :)

SEC 1. All banks, banking associations and other moneyed corporations and associations shall be liable to taxation on a valuation equal to the amount of their capital stock paid in or secured to be paid in, and their surplus earnings, (less ten per cent. of such surplus), in the manner now provided by law, deducting the value of the real estate held by any such corporation or association, and taxable as real estate.

SEC. 2. This Act shall take effect immediately.

Under this act, the defendants in error claim that they are justified in their action, whilst the plaintiffs in error insist that the enactment is void, as being in contravention of the Act of Congress of 25th February, 1862, and of the eighth section of the first article of the Constitution of the United States. (Er. b., fols. 30 and 31.)

## POINTS.

FIRST POINT.— Associations formed under the New York General Banking Law of 1838, are corporations, and exclusive of any contract between the State of

New York and the plaintiffs in error, the Legislature of the former has the right to tax the latter at discretion.

Bank of Watertown *vs.* Assessors of Watertown, 25 Wendell R., 686; 1 Hill R., 616.
People *vs.* Supervisors of Niagara, 1 Hill R., 20., 7 Hill R, 504.
The Newark City Bank *vs.* Assessors of the Fourth Ward of the city of Newark.
State *vs.* Granville Alex. Soc., 11 Ohio R., 1.
Ellis *vs.* Marshall, 2 Mass. R., 277.

Section 8, of Title 3, of Chapter 18, of the Revised Statutes of New York (2 N. Y. R. S., p. 597, 5th ed.), enacted in 1830, is in these words:

"The charter of every corporation that shall "hereafter be granted, shall be subject to altera- "tion, suspension, and repeal in the discretion of "the Legislature."

By section 32, of chapter 260, of the Laws of 1838, being the General Banking Law of the State of New York, under which the plaintiffs in error are incorporated and do business, it is enacted that the Legislature may, at any time, alter or repeal that act.

Under these decisions and enactments, therefore, there is no contract between the people of the State of New York and the plaintiffs in error, limiting the right to tax them, or in any other manner, to modify their charters.

SECOND POINT—By the Tax Laws of the State of New York, so much of the capital of all Corporations as is not invested in real estate is treated as personal property, and made liable to taxation: and, for the purposes of taxation, those laws treat the sum of money paid in at their organization, as continuing to exist in its original form.

§ 1 of Title 1st of Chapter 13, of 1st Part of New York Revised Statutes. (1 N. Y. R. S., p. 905, 5th ed.)

Section fourth of that title is in these words: "Personal estate and personal property * * "* * shall be construed to include such "portion of the capital of incorporated companies, "liable to taxation on their capital, as shall not be "invested in real estate."

The capital stock, therefore, of the plaintiffs in error, under this definition, is personal property, liable to taxation under the tax laws of the State of New York.

THIRD POINT—The Tax Laws of the State of New York became, as soon as the plaintiffs in error were incorporated, a part of their Charter.

At the time they came into existence, the laws of the State of New York declared that all personal

estate within that state should be liable to taxation; and that, that term should be construed to include such portion of the capital of the plaintiffs in error as should not be invested in real estate. §§ 1 & 4 of Title 1st of Chapter 13 of Part 1st of N. Y. R. S. (1st R. S. pp., 905, 906, 5th ed.)

FOURTH POINT—The Statute of the State of New York of 1863, (Chapter 240, of the Laws of 1863,) is simply an amendment of the Tax Laws, which existed at the time of the incorporation of the plaintiffs in error, and is authorized by the decisions and enactment cited under the first point above.

FIFTH POINT—The decisions of the highest court of a state as to the construction and meaning of the Statutes of such state are controlling in this Court, as much so as the decisions of this Court, as to the construction and meaning of the Constitution of the United States, treaties and other subjects within its exclusive jurisdiction are conclusive on the State Courts.

Towle *vs.* Forney, 4 Kern. R. 423.
D'Wolf *vs.* Rabaud, 1 Peters R. 476.
Bell *vs.* Morrison, 1 Peters R. 351.
Gardner *vs.* Collins, 2 Peters R. 58.

The Court of Appeals of the state of New York

has defined the meaning of the Statute of that state, passed in (Chap. 240, of the Laws of) 1863.

People, *ex rel.*, The Bank of the Commonwealth, Appellants, *vs.* The Commissioners of Taxes and Assessments of the city of New York, Respondents.

In this case the words "moneyed corporations shall be liable to taxation on a valuation, &c." as used in the Act of 1863, have been defined and declared to mean nothing more than if the Act had said "the corporations shall be taxed on an amount equal to their capital stock paid in, &c."

SIXTH POINT—The same high court of the State of New York has also defined the meaning of the words "Capital Stock" as used in the tax laws.

The Mutual Insurance Company *vs.* the Supervisors of Erie; 4 Comst., 442.
The Sun Mutual Insurance Company *vs.* The Mayor, &c., of the City of New York, 4 Seld., 241.

In each of these cases, involving questions, arising under the Tax Laws of the State of New York, the term "Capital Stock" was declared to mean the "original amount of money paid in or secured to be paid in," to enable a moneyed Corporation to transact its business.

The above New York Statute of 1863, therefore, amounts to nothing more than the establishing of an arbitrary rule of taxation upon moneyed Corporations, by which they are directed to pay a tax upon an amount equal to the sum of money originally paid or secured to be paid in by the subscribers to their stock, to enable them to transact business.

SEVENTH POINT—The power of taxation being a sovereign power, essential to the existence and administration of every government, it must be concluded that every state and government is unlimited in the exercise of that power, provided that in selecting the subjects to be taxed, it confines itself to those within its jurisdiction. The government, having jurisdiction of the subject to be taxed, is the sole judge both as to the propriety and expediency of taxing it and as to the extent and amount of such taxation. Jurisdiction of the subject once acquired, the government in the exercise of the taxing power is omnipotent.

Town of Guilford *vs.* Supervisors of Chenango, 3 Kernan, 143.

Brewster *vs.* City of Syracuse, 19 N. Y., p. 116.

This construction of the taxing powers of a government is in entire accord with views of Marshall, Chief Justice, as contained in his opinion in case of McCulloch *vs.* State of Maryland, 4 Wheaton, pp. 428 and 429.

That the relators are within the jurisdiction of the State government, which has imposed a tax upon them, cannot be questioned, since they are the creatures of that government, and their very existence is dependent upon its pleasure.

Under the construction which has been placed upon the Act of 1863, by the Court of Appeals, there can be nothing objectionable in the tax imposed upon the Relators. The construction of the act adopted by that court is, that the tax is not upon the property of the Relators, nor yet upon the stocks in which it is invested, but upon the franchise.

The State, by this act of 1863, merely compels the plaintiffs in error, in return for the benefits conferred upon them by their charters, to contribute a certain sum towards its support, and lays down the rule by which such sum is to be ascertained.

EIGHTH POINT.—The judgment of the Court of Appeals of the State of New York, should be affirmed.

JOHN E. DEVELIN,

*of Counsel for Defendants in Error.*

# Supreme Court,

OF THE UNITED STATES.

THE PEOPLE *ex. rel.* BANK OF COMMERCE IN NEW YORK,
Plff's in Error,
*vs.*
THE COMMISSIONERS OF TAXES, &c.,
OF THE CITY OF NEW YORK,
Defts. in Error.

## I. — EXTRACTS FROM THE STATUTES OF THE STATE OF NEW YORK.

## II.—OPINION OF COMSTOCK J., IN THE PEOPLE vs. COMMISSIONERS OF TAXES, &c., IN NEW YORK COURT OF APPEALS, 23 N. Y. R., (9 Smith,) p. 192.

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# Supreme Court,

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# EXTRACTS FROM THE STATUTES

OF THE

# STATE OF NEW YORK.

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REVISED STATUTES, PART I., CHAPTER 13.

## TITLE I.

*Of the property liable to taxation.*

SECTION 1. All lands and all personal estate within this State, whether owned by *individuals* or by *corporations*, shall be liable to taxation, subject to the *exemptions* hereinafter specified. 1 Rev. Stat., 387.

SECTION 3. The terms "*personal estate*," and "*personal property*," whenever they occur in this chapter, shall be construed to include all household furniture, monies, goods, chattels, debts due from solvent debtors, whether on account, contract, note, bond or mortgage, public stocks, and stocks in moneyed corporations. They shall also be construed to include such *portion of the capital of incorporated companies*, liable to taxation on their capital, as shall not be invested in real estate.

1 Rev. Stat., 888. SECTION 4. The following property shall be *exempt* from taxation:

1. All *property*, real or *personal*, *exempted* from taxation by the Constitution of this State, or under the *Constitution of the United States*.

2. All lands belonging to this State, or the United States.

3. Every building erected for the use of a college, incorporated academy, or other seminary of learning; every building for public worship; every school-house, court-house, and jail; and the several lots whereon such buildings are situated, and the furniture belonging to each of them.

4. Every poor-house, alms-house, house of industry, and every house belonging to a company incorporated for the reformation of offenders, and the real and personal property belonging to or connected with the same.

5. The real and personal property of every public library.

6. All stocks owned by the State, or by literary or charitable institutions.

7. The personal estate of every incorporated company not made liable to taxation on its capital in the Fourth Title of this Chapter.

8. The personal property of every minister of the gospel, or priest of any denomination; and the real estate of such minister or priest when occupied by him, provided such real and personal estate do not exceed the value of one thousand five hundred dollars; and—

9. All property exempted by law from execution.

SECTION 7. The owner or holder of stock in any incorporated company liable to taxation on its capital, shall not be taxed as an individual for such stock. 1 Rev. Stat., 888.

## TITLE II.

*Of the place in which property is to be assessed.*

SECTION 6. The real estate of all incorporated companies, liable to taxation, shall be assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals. All the personal estate of every incorporated company, liable to taxation on its capital, shall be assessed in the town or ward where the principal office or place for transacting the financial concerns of the company shall be; or if such company have no principal office or place for transacting its financial concerns, then in the town or ward where the operations of such company shall be carried on. 1 Rev. Stat., 869.

## TITLE IV.

*Regulations concerning the Assessment of Taxes on Incorporated Companies, and the commutation or collection thereof.*

SECTION 1. All monied or stock corporations deriving an income or profit from their capital, or otherwise, shall be liable to taxation on their capital, in the manner hereinafter prescribed.

SECTION 2. The President, Cashier, Secretary, Treasurer, or other proper officer of every such incorporated company, shall, on or before the first day of July in each year, make and deliver to the assessors, or one of them, of the town or ward in which such company is liable to be taxed, according to the provisions of the sixth section of the second title of this chapter, a written statement, specifying—

1. The real estate, if any, owned by such company, the towns or wards in which the same is situated, and the sums actually paid therefor;

2. The capital stock actually paid in, and secured to be paid in, excepting therefrom the sums paid for real estate, and the amount of such capital stock held by the State, and by any incorporated literary or charitable institution; and,

3. The town or ward in which the principal office or place of transacting the financial business of such company is situated; or if there be no such principal office, the town or ward in which its operations are carried on, or in which it is liable to be taxed, under the provisions of this chapter.

SECTION 3. The President, or other proper officer of every such company, shall also deliver to the Comptroller, on or before the first day of July in each year, a written statement, containing the same matters required by the foregoing section, to be specified in the statement to be delivered to the assessors. The statements required by this and the preceding section of this title, shall be certified, under the oath of the President, or other proper officer, to be in all respects just and true.

SECTION 6. The assessors shall enter all incorporated companies from which such statements shall have been received by them, and the property of such companies, and

the property of all other incorporated companies liable to taxation in their respective towns, in the assessment rolls, in the following manner:

1. They shall insert in the first column of their assessment rolls the name of each incorporated company in their respective towns or wards liable to taxation on its capital or otherwise; and under its name they shall specify the amount of its capital stock paid in, and secured to be paid in; the amount paid by such company for real estate then belonging to such company, wherever the same may be situated; the amount of all surplus profits or reserved funds, exceeding ten per cent. of their capital, after deducting therefrom the said amount of said real estate, and the amount of its stock, if any, belonging to the State and to incorporated literary and charitable institutions. As amended by Act of July 21st, 1858, Laws of '58, chap. 654, p. 1940.

2. In the second column, they shall enter the quantity of real estate owned by such company, and situated within their town or ward; and in the third column, the actual value thereof, estimated as in other cases.

SECTION 3. In the fourth column they shall enter the amount of the capital stock of every incorporated company paid in, and secured to be paid in, and of all such surplus profits or reserved funds as aforesaid, after deducting the sums paid out for all the real estate of such company, wherever the same may be situated, and then belonging to it, and the amount of stock, if any, belonging to the People of this State, and to incorporated literary and charitable institutions. As amended by Act of July 21st, 1858, Laws of '58, chap. 654, p. 1940.

SECTION 15. The amount of taxes assessed on all incorporated companies liable to taxation, shall be set down by the Board of Supervisors, in the fifth column of the corrected assessment roll, and shall form part of the moneys to be collected by the collector. As amended by Act of April 15, '57, Laws of '57, chap. 456.

## *Act of April* 15, 1857.

Laws of '57, chap. 456.

SECTION 3. The capital stock of every company liable to taxation, *except* such part of it as shall have been excepted in the assessment roll, or as shall have been *exempted by law*, together with its surplus profits or reserve funds, exceeding ten per cent. of its capital, after deducting the assessed value of its real estate and all shares of stock in other corporations actually owned by such company, which are taxable upon their capital stock under the laws of this State, shall be *assessed* at its *actual value*, and *taxed* in the *same manner* as the *other personal* and *real estate* of the *county*.

## *Act of April* 16, 1857.

Laws of '57, chap. 617, p. 497.

SECTION 1. There shall be in the city of New York three Tax Commissioners as now provided for by law, but they shall hereafter be designated Commissioners of Taxes and Assessments; and the persons now holding such offices shall continue to hold the same until the first Monday of July, 1859, when their several terms shall expire.

Laws of '57 chap. 617, p. 498.

SECTION 4. The offices of Ward Assessors in the city of New York, as heretofore existing, are hereby abolished, and the powers and duties now vested in and performed by those officers, relative to the assessment of real and personal estate, shall hereafter be vested in and performed by the officers provided for by this Act, and in the manner hereinafter provided; and the provisions of law now existing in respect to the mode and manner of making assessments by the Ward Assessors in the city of New York, as far as the same are conformable to the supervision of the Commissioners of Taxes and Assessments, are hereby made applicable to the officers provided for by this Act.

Laws of '57, chap. 617, p. 500.

SECTION 12. During the time the books shall be open to public inspection, as hereinbefore provided, application may be made by any person considering himself aggrieved by the assessed valuation of his real or personal estate, to have the same corrected. If such application be made in

relation to the assessed valuation of real estate, it must be made in writing, stating the grounds of objection thereto; and thereupon the Commissioners shall examine into the complaint, and if in their judgment the assessment is erroneous, they shall cause the same to be corrected. If such application be made in relation to the assessed valuation of personal estate, the applicant shall be examined under oath by said Commissioners, or any of them, and if in their judgment the assessment is erroneous, they shall cause the same to be corrected, and declare their decision thereon within thirty days after such application shall have been made by them. No reduction shall be made by the board of supervisiors of any assessment on real or personal estate imposed under this act, unless it shall appear under oath or affirmation that the party aggrieved was unable to attend within the period prescribed for the correction of taxes, by reason of sickness or absence from the city.

SECTION 13. It being the intention of this act to provide for the better equalization of the taxation in the city and county of New York, the Commissioners may at any time before the twentieth of April in each year increase, and at any time before the closing of the books of annual record on the first day of May in each year, diminish, the assessed valuation of any of the aforesaid assessed taxable real or personal estate in said city, as in their judgment may be necessary for such equalization; but they shall not increase such valuations after said books are open for correction and review, except upon notice being given to the party affected by such increase twenty days before the closing of said books.

SECTION 24. A certiorari to review and correct on the merits any decision or action of the said Commissioners, under section twelve or thirteen of this act, shall be allowed by the Supreme Court, or any judge thereof, directed to the said Commissioners on the petition of the party aggrieved, and shall, with the return, be heard and decided forthwith by said Court in preference to all other matters, actions, or proceedings.

*Act of April* 29, 1863. *Chap.* 240.

## AN ACT in relation to the taxation of moneyed corporations and associations.

SECTION 1. All banks, banking associations and other moneyed corporations and associations shall be liable to taxation on a valuation equal to the amount of their capital stock paid in or secured to be paid in, and their surplus earnings (less ten per cent. of such surplus) in the manner now provided by law deducting the value of the real estate held by any such corporation or association and taxable as real estate.

§ 2. This act shall take effect immediately.

## OPINION OF COMSTOCK J., IN THE PEOPLE *vs.* COMMISSIONERS OF TAXES, &C., IN NEW YORK COURT OF APPEALS, 23 N. Y. R., (9 Smith,) p. 192.

COMSTOCK, Ch. J. (Dissenting.): The taxing power of this State does not extend to stocks issued by the Government of the United States. This proposition, in its broadest sense, was determined by the Supreme Court of the United States in the case of *Weston et al.* v. *The City Council of Charleston* (2 Pet., 449). In that case the Corporation of the city of Charleston, deriving its powers from the State of South Carolina, had passed an ordinance subjecting personal estate within the city to taxation, and enumerating in the list of things to be taxed six and seven per cent. stocks of the National Government. The plaintiffs, being the owners of such stocks, applied to the Court of Common Pleas for the Charleston District, for a writ of prohibition to restrain the city council from levying the tax on those stocks; on the ground that the ordinance was, in that respect, contrary to the Constitution of the United States. The prohibition was granted. The proceeding was brought into the highest State Court for review, where the decision of the Common Pleas was reversed, and a decision was made that the ordinance was constitutional and valid. From that decision the plaintiffs brought error into the Supreme Court of the United States. In that Court a preliminary question arose whether the judgment of the State Court was reviewable under the judiciary act of Congress. That question was decided in the affirmative; and then the only point to be determined was whether, by force of the Federal Constitution, the stocks of the Government were exempt from taxation in the States, and in the cities of the States. After a very elaborate argument, Chief Justice Marshall delivered the opinion of the Court, holding that the ordinance of the

city of Charleston was unconstitutional, so far as it subjected such stocks to taxation. The judgment of the State Court was accordingly reversed, and a judgment was directed to be entered declaring it to be the opinion of the Court that the ordinance was repugnant to the Constitution and void.

This decision was pronounced by the high tribunal appointed by the Constitution itself to be the interpreter of its provisions. It has never been departed from, and, I think, never questioned in the slightest degree. It would, therefore, be entirely inappropriate for us to suggest the reasons by which the conclusion is supported. It would be, moreover, a work of supererogation, because the opinion of Chief Justice Marshall is not only convincing, but it leaves nothing to be added. It should be observed, however, in reference to what has been said in the present case, that the decision proceeded on the broadest possible ground. No suggestion was made in the reasoning of the Court that the Government stocks had been invidiously selected for taxation with any purpose hostile to the Government or laws of the Federal Union. They had been assessed as the personal estate of individuals, and like other personal estates; and the simple and sole inquiry was, whether any power resided in the States, or in municipal bodies created under State authority, to tax them. This was determined in the negative, and we are bound by the decision. Upon all questions of conflict between the Constitution and laws of the Union and the constitutions and laws of the States there can, in the very nature of our political system, be but one rule of decision, and that rule must be declared in the last resort by the Supreme Court of the United States. In the consideration, therefore, of the question now before us, we must proceed on the fundamental assumption that stocks of the United States Government are absolutely exempt from taxation by any power in this State.

According to the assessment laws of this State, property is not taxed by enumeration or specification. All real and personal estate within the State is liable to taxation, with certain exemptions. (1 R. S., 387, § 1.) The local law or ordinance of the City of Charleston, adjudged to be void in the case which has been cited, enumerated the different

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species or kinds of property upon which revenue was intended to be raised, including the Government stocks in the specification, the prescribed rate of taxation, however, being uniform. If in the case now before us, the exemption were claimed by an individual instead of a corporation, and if our law made no exception in favor of property exempt under the Constitution of the United States, the difference in circumstance between the case and the one determined by the Federal Supreme Court would be simply that which exists between taxation of all property without exception and taxation of certain classes, by a specification which includes property exempt under the Constitution of the United States. The taxing power of a State may be exerted in either of these modes as to all property which can be taxed. In the latter mode it cannot be exerted so as to embrace stocks issued by the United States, because the attempt to exert it is in violation of the Constitution. The fundamental question in this case, I think, is whether that description of property can be and ought to be embraced in assessing, according to the other mode, the personal estate of an individual or a coporation. I am satisfied for reasons to be presently given, that no distinction in this respect can be made between an individual and a corporation.

It cannot be denied that State power might be exercised more inconveniently, not to say more dangerously, to the Federal Government in one of these modes, than in the other. In the one, the power might be used so as to exempt the mass of property belonging to the citizens of a State or municipality, and so as to cast the burden of State expenditure upon the credit of the Union. In the other, taxation is necessarily uniform upon all property, and flagrant abuse of power is perhaps impossible. Nevertheless, it seems to me, the question does not depend upon these considerations. As to all subjects over which the taxing power of a State extends, there are no limitations depending on the mode of its exercise. Discrimination between different kinds of property may be made in the pleasure of the Legislature, where the right of taxation exists at all. Every holder of United States Government stock is a creditor of the Government, and the value of all such stocks is more or less dependent on their exemption from burdens imposed by

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the States. If we admit the right, to tax this credit in any mode and to any extent, we must admit it in a different mode and to a greater extent. There is no limit to the principle. The acknowledgment of the right in any degree, involves a conflict between the Federal Union and the parts of which it is composed. But as the Union is supreme in the exercise of all its powers, including the vital one of borrowing money, no authority can be constitutionally opposed to it while confined to the exercise of those powers. This is a principle which demands the absolute exemption of the national credit from State taxation. Such, I understand to be the doctrine of the Supreme Court of the United States, and as such we are to accept it.

This would be my conclusion if the State of New York had, by its legislation, attempted to subject this class of property to taxation. But I am satisfied that no such attempt has been made. By our Statute all lands and all personal estates within this state are made liable to taxation, subject to certain exemptions. (1 R. S., 387, § 1.) The first of those exemptions is of "all property, real or personal, exempted from taxation by the Constitution of this State, or under the Constitution of the United States." (§ 4.) The force of this exemption should be carefully considered. We have seen that these public stocks cannot be assessed in the mode of enumeration or specification; all such attempts being repugnant to the Constitution of the United States. Now if the exemption declared by the Statute, in the words just quoted, could be understood as referring to that particular mode of assessment, they most clearly would not of themselves prohibit the administrative or taxing officers from rating an individual in a sum equal to the value of all his personal estate without any deduction for Government stock which he might own. On that supposition, the only question would be one of power in the State Government, which has been considered. But the words of the Statute can have no such reference, and admit of no such interpretation; because there is no such mode of assessment in this State. Our laws of assessment contain no specification of the subjects of taxation. They provide for a valuation of the estate of the taxpayer in mass, of whatsoever it may consist, and consequently if he owns anything which is ex-

empted by law, its value must be deducted from the value of the mass. It is the same thing as to say that property not exempt, and no other, is to be valued and taxed. Every exception contained in the Statute of things from taxation, and there is a considerable number of them, necessarily refers to the actual system of taxation in the mass, for we have no other; and all such exceptions are to be interpreted accordingly. The conclusion is plain. The Constitution of the United States, according to its true interpretation, exempts the national credit from taxation by State power, and the prohibition has the same force and effect as if it were declared in express words. The Legislature of this State, in providing for taxation of personal estate of its citizens in the mass and according to value, has expressly excepted whatsover is exempt under and according to the Federal Constitution. Putting aside then the question of power, whether it would be possible to evade the Constitution by that mode of assessment, the Legislature have declared, in a manner too plain to be mistaken, that no such evasion is intended. They have provided for aggregate or gross valuations of property, excepting therefrom such things as are exempt, and they have declared in general or particular terms what those things are. It is a necessary result that those things are to be omitted in such valuation.

This conclusion, may, perhaps, be rendered still more evident, if we observe that the national Constitution exempts nothing from taxation by any express words of that instrument. Our Legislature, therefore, in making the exception of which we are speaking, refer to property which is exempted not by any express language, but "under," or according to the Constitution; and there is no room to doubt that they had in view the very class of property now in question, because at that time, the Constitution had been intepreted in this respect, and the right of exemption ascertained and declared by the judicial power of the Federal Government.

In order to be fully understood on this point, I observe once more: The credit of the United States Government is admitted to be exempt from taxation in the States; but the suggestion is made that this applies only to taxation *eo nomine*, or by enumeration and specification of the thing

itself, a suggestion which leaves the States at liberty to rate their citizens according to the value of their property in mass, and without any deduction of that, which is thus exempt. Our own legislation is fatal to this argument, because under our Statutes all taxation is according to this mode: and those very statutes declare that whatever is exempt under the national Constitution, shall not be included in the valuation. The exemption, therefore, of the stocks of the United States Government, rests not only upon the want of power in the State, but upon the intention of its Legislature.

I come now to a supposed distinction unfavorable to corporations, in this State, which may own the kind of property now in question. The very able and discriminating counsel who has argued this case for the respondents, has relied mainly on that distinction. Feeling, I presume, the force of the considerations which have been urged, he has scarcely denied that if Government stocks, owned by an individual, had been included in an assessment against him, a correction of the roll could be rightfully demanded; but he has insisted that no such correction can be claimed by a corporation. This result is claimed to flow from the manner in which our assessment rolls are made up, and corporations are rated under our Statutes.

For myself, I feel very little difficulty in this branch of the case. In the first place, if it has been shown that stocks of the United States Government cannot be subjected to taxation, when owned by an individual, the rule is manifestly the same when they are held by a corporation. The rule is the exemption of the thing or subject, and it has no respect to the ownership. There is not one interpretation of the Federal Constitution when an individual claims exemption under it, and another, when a corporation makes the same claim. The suggestion has been made, that the Legislature may tax corporations in any mode, and to any extent, as the price of the privileges and franchises conferred in their charters. This is true, as to all subjects to which the taxing power of the State extends. But when a corporation acquires property which is absolutely exempt from all burdens imposed by the States, under the higher authority of the Constitution of the United States, by ine-

vitable logic such property is acquired and held free from taxation. In this State, all taxation is upon property. It is the same thing in substance to say that it is upon the owner in respect to property. If the holder of Government stocks is charged because he buys and owns them as a part of his wealth, to the extent of such charge their value in market is depreciated and the credit of the Nation is taxed, and it becomes perfectly indifferent whether a natural or an artificial person is the proprietor. The exemption, if it exists at all, is the result of a constitutional principle which operates in all circumstances, and follows the property wherever it goes. So, too, the law of this State is of universal application. The language of the Statute is that "all lands and all personal estate within this State, whether owned by individuals *or corporations*, shall be liable to taxation," subject to certain exemptions afterwards specified; and among those exemptions as we have seen, is the one which includes stocks of the United States. If this language does not apply the same rule of taxation and exemption both to individuals and corporations, I greatly misapprehend its meaning.

The subject is, however, perhaps somewhat obscured by the statutes which regulate the mode and details of assessing corporations. By the Revised Statutes, the assessors are directed to enter upon the rolls the names of corporations, and under each name the amount of capital stock paid in and secured to be paid. The quantity and value of real estate are to be entered in the second and third columns. In the fourth column, they are directed to insert the amount of capital stock paid in, and secured to be paid in, deducting the sums invested in the real estate, and the amount of the stock held by the State, or by literary and charitable institutions. (1 R. S., p. 415, § 6.) In the fifth column, of what is called the corrected assessment roll, the actual amount of the tax imposed is to be extended (id. § 15), but how that amount was to be determined, that is to say whether by the real or nominal amount of capital, was not expressly directed in the Revised Statutes. In 1853, those statutes were so amended as to bring within the influence of taxation the surplus profits or reserved funds of corporations, exceeding ten per cent. of their capital stock, and,

also, so as to authorize a commutation of taxes in the case and manner particularly set forth. (Laws of 1853, ch. 654, p. 1240.) In 1857 an act was passed which, after repealing in the first section all antecedent statutes which authorized a commutation of taxes, and amending in the second section the previous provision as to the fifth column of the assessment roll, proceeds in the third section to declare, that "the capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll, or as shall have been exempted by law, together with its surplus profits or reserved funds exceeding ten per cent. of its capital after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this State, shall be assessed at its actual value, and taxed in the same manner as other real and personal estate in the county." It is said that prior to this act of 1857, corporations were to be taxed according to the nominal and not the real value of their capital or stock; and this it is supposed, in some degree, favors the views of the respondents in this case. The argument, if I understand it, is, that according to this rule of taxation, the assessors or tax commissioners were to consider nothing but the sum of the capital subscribed and paid or secured (until surplus profits were included in 1853), and could not inquire as to the things in which the capital was invested, so as to ascertain the real value of the corporate estate, or whether any part of it was exempted from taxation.

It appears to me that this argument is plainly fallacious. The Code of taxation in the Revised Statutes begins with declaring the real and personal estate both of individuals and corporations to be liable to taxation, subject to certain exemptions, and it then declares the exemptions applicable alike to both. In the subsequent titles, the mode and details of assessment are considered and provided for, while the exemptions are not again referred to. But these must be understood as qualifying the entire Code. Thus, in the case of individuals, the mode of making up the assessment rolls is prescribed, and it is directed that "the full value of all personal estate" shall be entered in the fourth column.

(1 R. S., 391, § 9.) Moreover, in a fifth column, the actual amount of the tax is to be extended by the Board of Supervisors. So precisely, as we have just seen, it is in respect to corporations. The original capital stock is to be set down, and the tax is to be extended in the same manner. No one ever supposed that the prescribed mode and form of assessing an individual could deprive him of the exemptions antecedently declared in his favor. Why then should the same mode and form of proceeding in the case of a corporation have that effect? I am sure this argument rests upon no foundation. If it be said there is no authority in the statutes for correcting the roll in this respect in favor of the taxpayer belonging to one class, it is equally true as to the other class. And by proving too much, the argument is demonstrated to be unsound.

Aside from all questions of exemption, it is not now very material to inquire whether before the act of 1857 the nominal instead of the real value of the capital or stock of a corporation was the standard, and the only standard of assessment.

On this point the statute quoted from the Laws of 1857, leaves no longer any doubt. The leading design of this act was to abrogate the practice of assessing corporations according to nominal values, and to introduce the principle, far more reasonable and just, of taking actual value as the standard. This design was accomplished by the use of language too plain to require comment. That such is the interpretation of the statute has already been determined by this Court. (*Dolloway* v. *The Oswego Starch Factory*, 21 N. Y., 449.)

In applying the principle thus introduced, the assessor must of necessity have or acquire some knowledge of the actual property, funds and estate which corporations possess, as well as of the liabilities against them. These are the circumstances, and the only ones, which can determine the actual value of their capital or stock. If the shares held by individuals are a subject of sale in market, the sales no doubt are evidence of such actual value; and in the absence of other knowledge, the assessors may act upon that basis. But this evidence is often wholly wanting, because, in very many instances, sales of shares are nearly or

quite unknown. Again, in instances still more numerous, evidence of this kind will be entirely fallacious. There is no property so liable to gambling and speculation, as stock in corporations. Its value is often unknown to the large body of the holders, because those having leading interests and concerned in the management conceal such value for their own private purposes. Stocks may be, and frequently are, inflated or depressed by those who wish to sell or to buy. They are subject, moreover, to all the vicissitudes of the money market. They go up or down in the fullness of expectation and hope of to-day, or in the panic of to-morrow. Actual value is the result to be arrived at, for such are the words of the statute, and the inquiry, therefore, must have a primary regard to the property and estate, which alone impart such value. I have endeavored to show that without this statute of 1857, the argument for the respondents, which rests upon the idea that the sum of the capital subscribed and paid, or secured to be paid, is the sole standard of assessment, fails. But with this statute, which is now a fundamental part of the system of taxation, the very foundation of that argument seems to be removed.

It remains to examine the distinctive theory, upon which the Judges of the Court below have proceeded in this case. They have conceded that the credit of the United States is universally exempt from taxation. They suggest no mode of assessing such property whether constituting part of the capital of an individual or a corporation. The only ground, therefore, upon which they have been able to sustain the action of the tax commissioners is, that taxation in respect to corporations is not upon their capital or estate, but upon their own stock, as a thing quite distinct from capital. According to this view, the relators have not been assessed in respect to their Government stocks or upon any other property, and have nothing to complain of. This conclusion seems to be derived from the use of the terms "capital stock," in the statutes which prescribe the manner of preparing the assessment rolls.

This theory only needs to be analyzed in order to demonstrate its illusory character. A just conception of the meaning of terms is the first requisite. The word "capital" is unambiguous. It signifies the actual estate, whether in

money or property, which is owned by an individual or a corporation. In reference to a corporation, it is the aggregate of the sum subscribed and paid in, or secured to be paid in, by the shareholders, with the addition of all gains or profits realized in the use and investment of those sums, or, if losses have been incurred, then it is the residue after deducting such losses. The corporation as a legal person, is the owner or proprietor of this capital, and there is not a corporation aggregate in the world which ever owned any else except the franchise of being a corporation. The term "stock" is, perhaps, sometimes used with less precision. It may occasionally be employed to denote the same thing as capital. If that were its meaning in the statutes, of course the argument of the Supreme Court in this case would not have even a verbal criticism to rest upon. But, whenever it means anything different from the capital of a corporation, it can refer to nothing else than the interests of the shareholders or individuals. Such interests are called "stock," and the sum total of them is appropriately enough called the "stock" of a corporation. Those interests are the resulting estates of private persons, which flow from the nature of corporate organizations. In some respects, they resemble a chose in action, and thus are so treated in the relation of husband and wife and in other relations. More accurately, I think, they may be called equitable estates, which entitle the holders to share in the income of the capital, which is legally vested in and managed by the corporate body. The material point now is, that corporations themselves never own what is sometimes called their own stock. They have the power and capacity to create and issue stock, but when created and issued it always belongs to the individual to whom it is issued, or to his assignee. In his hands it may or may not be subject to taxation, like other private property in the pleasure of the legislature. In this State such property is exempted by law, because the capital itself held by corporations is assessed and taxed. In saying that corporations never own their own stock, of course I mean that which has been subscribed and paid for or secured to be paid by the shareholders. The capacity which a corporation has within its charter of receiving subscriptions and payment for stock, and then issuing it to the

individual who subscribes and pays is a species of valuable right. But this is not material, because the laws of assessment only speak of capital or stock, or capital stock which has been paid or secured; and stock in that condition can never, in the nature of things, be owned by a corporation.

The result of this upon taxation is plain. Property is taxed according to our laws, and the owners are assessed in respect to it. Corporations are not to be assessed in respect to their stock as something distinct from their capital, because in that sense they are not the owners of it. They contribute to the public burdens on the basis of their capital like the owners of private estates, and because they have nothing else which is the subject of taxation. The mode of ascertaining the value of such capital in the assessment rolls is indifferent to the question. The sum of the stock subscribed and paid for, or secured to be paid, may or may not be taken as the presumptive value. In whatever way the result is reached, the burden is imposed on the artificial person or body in respect to the capital or estate of which it is the proprietor, and it is not imposed on the intangible substance called "stock," which is parceled out to individual owners. That this is in accordance with all the principles and analogies of taxation known to our laws, it needs no argument to prove.

Plain as I think this conclusion is, the question is not exhausted without looking at the statutes under which it is supposed to arise. Let us refer to them, keeping in view the theory we are endeavoring to refute, which is, that stock—as meaning something wholly different from the capital or estate of a corporation—is the subject of taxation. The subjects of taxation and those which are exempt from it are precisely defined in the title which preceeds all others in the Code of assessment laws. (1 R. S., 387.) In the very first section it is provided, that "all lands and all personal estate within this State, whether owned by individuals *or corporations*, shall be liable to taxation," &c. Can language more explicitly declare, that it is the capital or estate of corporations which the legislature intended, and not their stock in the sense now contended for? In the 4th section of the same title, the exemptions are specified, and among them (sub. 4) the houses, lands and personal estate of companies incorporated for the reformation of offenders,

and (sub. 7), "the personal estate of every incorporated company not made liable to taxation on its capital in the 4th title of this chapter." Now it is this 4th title which contains the provisions for making up assessment rolls against corporations in some of which the term "capital stock" is used. The reference to that title here quoted, and the use of the word "capital" in such reference, prove absolutely that the terms "capital," and "capital stock," are employed in precisely the same sense. Referring now again to the first title, we find a further provision (§ 7), excepting "the owner or holder of stock in any incorporated company liable to taxation on its capital." Here, again, the subject is clearly defined. Stock is not to be taxed, but capital is; the one is marked as the property of the individual, the other as that of the corporation.

Passing the second and third titles, which relate to the assessment and collection of taxes against individuals, and to subjects connected therewith, we come to the 4th, which relates to corporations. (1 R. S., 414.) In the very first section, we find it declared that corporations shall be liable to taxation on their capital in the manner hereinafter prescribed. The grounds for a verbal criticism, slight as they are, would not exist at all, but for the 6th section, which, as we have seen, relates to the assessment rolls. But the very first requirement of that section is, that the assessors shall enter the names of corporations, and the "*property*" of each in the manner specified, and the first specification is the "capital stock paid in or secured to be paid in." Again, the 10th section of the same title declares that the "capital stock" shall be assessed, &c., unless the corporation shall be entitled to commute its taxes, in which case no tax shall be imposed on the "*property*" of such corporation. Thus we find the word "capital," "capital stock," and "property," indiscriminately used throughout this title to designate the estate of a corporation. It may well be, that before the act of 1857, such estate was to be taken at its nominal value; that is to say, estimated at the amount of capital originally subscribed and paid or secured, without regard to depreciation and loss. This is indifferent, as we have shown. The point of the discussion now is, that the estate or capital at whatever valuation, and not the stock in the sense of that term contended for, is the subject

dealt with by the assessment laws. Indeed, we may take the very words on which the criticism arises, "capital stock paid or secured to be paid in." I affirm that these words are descriptive of nothing else than capital. The sums subscribed and paid in, or secured to be paid in, are the capital of a corporation in the real and actual sense. Stock, on the other hand, is paid for and is not "paid in." It is the thing which the subscriber receives in exchange for what he pays in. One of those values, that is the sum paid, is held by the corporation and becomes its capital. The other is given to the shareholder and becomes his stock. They are of totally different natures. The one is the object of taxation, the other is not. This appears to me so plain in reason, and upon the language of all the statutes referred to, that I pursue this point no further.

A single additional observation ought to be made upon the act of 1857. That statute, besides introducing, as we have seen, the principle of actual value as the basis of taxation, has declared in express words an exemption of whatever is exempted by other laws, in addition to the exceptions which are made in the assessment rolls. This clause was intended, out of abundant caution, to remove all the differences which could be imagined or suggested between the rules of taxation, as to individuals, and those in respect to corporations. The language necessarily refers to all property which was exempt under pre-existing statutes. It cannot refer to the stock of the corporation, held "by the State or by literary and charitable institutions," because that exception is made in the assessment rolls. In addition to this exception, we have the words "or as shall have been exempted by law," referring certainly to all laws exempting property from taxation. In those laws we find embraced stocks of the Government of the United States; and the right to hold them free from taxation would seem more plain in favor of a corporation than an individual, because the privilege is declared twice, instead of once only.

The judgment should be reversed, and the proceedings remitted, with a direction to correct the assessment roll.

Davies, J., did not hear the argument, and expressed no opinion.

Judgment affirmed.

Wm. C. Bryant & Co., Printers, 41 Nassau street, cor. Liberty.

# DECISION

OF THE

# New Jersey Supreme Court.

NEW JERSEY SUPREME COURT.

June Term, 1862.

| | |
|---|---|
| The Newark City Bank, *vs.* The Assessor of the Fourth Ward of the City of Newark. | Certiorari in matter of Assessments. |
| Charles A. Wallen, *vs.* The Same. | Do. Do. |

*For the Plaintiff*, Bradley & Zabriskie.
*For the Defendants*, Attorney General.

The Chief Justice.—These certioraris have been regularly issued and returned to this Court, and have brought before us the records of assessments just made against the respective plaintiffs. The duplicates still remain in the hands of the assessors, the time for their return to the collector not having arrived. Teere has, of course, been no

time for an appeal to the Commissioners of Appeal, to correct the errors complained of.

No motion was made to dismiss these certioraris, as improvidently and prematurely issued; on the contrary, they have been elaborately argued by the counsel of the respective parties upon the merits, for the avowed purpose of obtaining, at this time, before the assessments are completed throughout the State, the opinion of this Court upon the important questions involved, to avoid the great public embarrassment that might ensue if, at this time, assessments should be made upon erroneous principles, and be for that cause generally reversed. Under these circumstances we are not inclined, of our own motion, to dismiss these suits, but shall proceed to dispose of them upon their merits.

The cases were heard together, and as they involve the same points, it will be convenient to consider them at the same time.

In the City Bank case, the assessor returned that he had assessed that corporation:

| | |
|---|---|
| On its Capital Stock | $350,000 00 |
| On its accumulated surplus | 60,083 11 |
| Total | $410,083 11 |

That the bank claimed a reduction of the same, because, as was shown and proved to the assessor, the capital and accumulated surplus comprised, amongst other things, United States 5 per cent. bonds—

| | |
|---|---|
| Due in 1865 | $5,000 00 |
| United States 6 per cent. 1 year certificates | 122,000 00 |
| United States $7\frac{3}{10}$ per cent. Treasury notes | 73,000 00 |
| Bonds of the State of New Jersey, under the act of Feb. 16, 1861 | 7,000 00 |
| Total | $207,000 00 |

Which deduction the assessor disallowed as contrary to law.

| | |
|---|---|
| In the Wallen case the assessment is upon real estate | $20 00 |
| Personal estate | 105 00 |
| Total | $125 00 |
| The personal estate assessed consisted of bonds and mortgages | $3,500 00 |
| 20 shares of capital stock, Ocean Bank, city of New York | 2,000 00 |
| 10 shares New York Central Railroad | 1,000 00 |
| United States demand notes under the act of Congress, Feb. 25th, 1862 | 2,000 00 |
| New Jersey State bonds, under act of May 11th, 1861 | 2,000 00 |
| Total | $10,500 00 |

The following points are involved and must be decided:

1. Are the bonds of this State in the hands of Wallen, taxable?

2. Are the United States bonds and notes in his hands taxable?

3. Are the railroad and bank stocks held by him taxable, being stocks of corporations without this State?

4. Is the bank taxable for all or any of the items disallowed as deductions from the capital stock and surplus, viz.: the New Jersey State bonds and United States bonds and notes?

The act of March 28th, 1862, introduced into our system of taxation extensive and radical alterations, for the purpose of more equally distributing upon persons and property the increased burthen of taxation rendered necessary by the war for the preservation of the Union.

The main design of these alterations, was to extend as far as practicable the list of rateables, and to diminish, as much as possible, the number of non-taxable items com-

posing the wealth of individuals and corporations, and in some instances to change the mode of assessing that wealth; so as to reach it with more certainty than heretofore.

One of the most striking alterations is that taxing the corporations themselves, instead of the stock in the hands of stockholders, when they are corporations created by the State, and taxing their business done here, or capital employed here, when existing under charters granted by other States.

Out of these alterations springs more or less the difficulty to be found in the solution of the questions presented for decision.

As to the first point, the taxability of the bonds of this State, there can be no doubt. By the act authorizing their issue they are expressly exempted from taxation, for the purpose of increasing their negotiability, and have been issued bearing on their face a statement that they are free from taxation.

The express contract of the State, that they shall be exempt, is enough to settle this question; and even as to those issued after the passage of the act under consideration, the same rule must prevail. This exemption of these bonds was not intended to be effected by the general words of the act of 1862. New Jersey has always preserved unsullied her good faith whenever it has been pledged, and her Courts will never, by any nice refinements, open a way by which it may be violated.

Laws of 1861, p. 565.

2. The bonds and other evidences of debt issued by the United States and held by Wallen, are in his hands exempt from taxation by State authority.

The case of *Weston* vs. *The City of Charleston*, 2 Pet., 449, is a decision directly upon this point, and in my judgment must control this case. That decision was not made by the Court to turn upon the point whether the taxation attempted by State authority was discriminating against the bonds of the United States, or whether they were taxed in the aggregate of the taxpayer's wealth. In

the opinion of Chief Justice Marshall, the exemptions of these bonds from taxation by State authority, was made to rest upon the ground that they were the means employed by Congress, under the expressly granted power to borrow money, to effect that object, that a tax upon them was in substance and effect a State tax upon the exercise of one of the functions of Government.

The tax in question is a tax upon the contract subsisting between the Government and the individual; it bears directly upon that contract while subsisting and in full force. The power operates upon the contract the instant it is framed, and most imply a right to affect that contract. In the exercise of the power to borrow money, the Government applies directly to its citizens for the loan, without the intervention of State authority; it seeks no aid from the State, and is exempted from all control. For this purpose it is supreme, and may make such contract as Congress authorizes with the public creditor. It is essential to its exercise that the power should be entirely untrammelled by any burthen thrown upon it by State authority.

The same rule which would permit the credit of the United States to be taxed *inter alia* would logically permit its taxation by itself. It is not taxable, because it does not exist by State permission, and is not protected by State laws, or subject to State sovereignty, by State legislation or otherwise.

McCullough *vs.* The State of Maryland, 4 Wheat., 316.

To say that if only taxed in the bulk of the wealth of an individual, at the same rate as the rest of his property, there is no discrimination against the bonds, and that, therefore, the power to borrow money is not interfered with, or in any way crippled, does not touch the principle upon which the exemption of the national credit from State taxation rests. It only disposes of the argument *ab inconvenienti* against such taxation. It cannot be taxed at all, because it is the contract of the Government, which, as to this, is paramount to that of the State over the same citizens. A taxation of the contract is an indi-

rect taxation of the parties to it. A State cannot tax a function of the Federal Government, whether dormant or in exercise, or the necessary means for its exercise, whether a parol contract or one under seal.

Against this view it has been argued that it necessarily involves a prohibition of State taxation upon all the subjects of Federal taxation, as that necessarily, to a greater or less extent, impairs their capability of yielding a revenue by taxation.

This unavoidable conflict between two Governments over the same people and property was foreseen at the adoption of the Constitution, and permitted.

The common subject of both Governments must, by appropriate and concerted legislation, remedy this as far as possible. But the taxation of Federal loans is not within this necessity. The inexorable law of political economy is, that the taxation of a sum of money loaned falls ultimately upon the borrower. The money loaned is in the Federal treasury: the lender and his assigns have nothing but a voucher showing this fact. It is difficult to assign any better reason why a sum of money due the Government from the collector of a port, or of direct taxes, may not be taxed by the State as part of the private property of the collector. It is not taxable, because it is the money of the Federal Government, and not that of the collector. If the State may take it by the taxing power, it may take the whole or part at discretion.

It needs no argument to prove that on such a theory the existence of the Federal Government would be impossible. It might be destroyed without treason or rebellion.

I am not satisfied with the reasoning of Denio, Judge, in The People *vs.* The Commissioners of Taxes and Assessments, 23 N. Y. Rep., 192, in which the majority of the Court concurred, holding United States bonds taxable, for the reasons I have already given. The positions I have stated were not in Weston *vs.* The City of Charleston, *obiter dicta;* they were the very grounds of the decision. The discriminating mind of Marshall could not have failed to perceive that the tax in that case was not one upon United States stock only, but upon all bonds of a certain

grade, *including* these. He never would have been content to put the decision of that case on such narrow grounds.

It cannot certainly be a sound rule which makes the thing taxable when taxed with the rest of a man's property of every kind, but untaxable when only taxed in common with a part.

The Court could not determine how universal a tax law must be to be operative, or how partial to be inoperative, nor inquire into the intent with which the tax was imposed. The Supreme Court of the United States had no alternative except to say the Federal bonds cannot be taxed at all, or that to tax them was unlawful, unless all other property was taxed at the same time, or when the design was to cripple the borrowing power of the Federal Government, which would lead, upon a question of constitutional law, into a vexatious inquiry into a mere intention, which could never be ascertained.

In addition to this view of the case, which seems conclusive, if the national credit in the hands of an individual is not of itself, from the nature of things, free from State taxation, it is clearly in the power of Congress to make it so, either in the act authorizing the loan, or in a subsequent act. The power to make the loan carries with it the power to make all laws necessary for its success and protection when made, which Congress may pass. It must have the power to define the relations of citizens to the loan and to exempt it from all State interference.

The right of Congress to exempt a national loan from taxation would seem as clear as that of a State to exempt its own. Both should have that power for very obvious reasons; the existence of the power might be vital to the success of the loan.

By the act of 25th of February, 1862, passed since the decision of the New York Court of Appeals, and probably in view of it, to correct the evils flowing from it, Congress has, in the clearest possible language, declared that all stocks, bonds, and other securities of the United States, held by individuals, corporations, or associations, within the United States, shall be exempt from taxation by or under State authority.

If, therefore, these bonds and securities have been taxed in the hands of Wallen, he is entitled to relief.

By the act of March 28th, 1862, under consideration, it clearly appears that the bonds and securities are designed to be taxed as personal estate, and that the tax is not to be considered as either a capitation tax or an income tax.

The seventh section of the act declares that all *real* and *personal* estate within this State, whether owned by individuals or corporations, shall be liable to taxation, &c., &c.

The fifth section of the act declares that the persons and property hereinafter specified shall be assessed and taxed as hereinafter provided.

The sixth section regulates the imposition of the personal or poll tax; then follows the seventh section, already cited.

It is apparent from these citations that the bonds and securities are *themselves* taxed as personal estate and that the tax is upon them as property.

As to the third point stated, I think Mr. Wallen is taxable upon the foreign railroad and bank stock.

The power of the Legislature to tax extra territorial stocks when owned by persons taxable in this State has not been denied. It has been deliberately held by this Court in the cases of

The State *vs.* Brannin, 3 Zab., 484.
The State *vs.* Bentley, 3 Zab., 532.

The only question is, has it been done by the act of 1862?

Several reasons have been assigned, arising upon the construction of the act, to show that, by it taxation is strictly confined to personal estate within this State.

It is urged that by the fifth section, taxes are to be laid on the persons and property in the act specified as therein provided; that the seventh section expressly declares that all real and personal estate *within* this State, whether owned by individuals or corporations, shall be liable to taxation, in the manner, and subject to the exemptions *therein* specified, that is *in the act* specified.

It will be perceived that the argument goes to this ex-

tent; that no personal estate of any kind can be assessed unless within this State.

It would certainly be a remarkable result if the Legislature in its efforts to remodel the tax laws, so as to extend the range of taxation, and bring within its reach many things before exempt from taxation, had, by some strange oversight, exempted a class of property subject to taxation until the passage of the supplement of 1857.

Nixon's Digest, 802.

When the act of 1862 was passed, the laws in force regulating the subjects of taxation were the acts of 1846, 1854, and the supplements of 1857 and 1861, the former supplement exempting from taxation all public stock and other property owned by residents of this State subject to taxation in any other State on which taxes shall actually be paid, the latter the funds of certain charitable Associations.

Nixon, 851. (802.)

The second section of this act of 1854 provided that all real and personal estate within this State, whether owned by individuals or corporations, should be liable to taxation.

The third section defined the meaning of the term real estate, as used in the act, to include all lands, all water, power thereon, all buildings or erections thereon, affixed to the same, trees and underwood growing thereon, and all mines, quarries, and all fisheries.

The fourth section defined the term personal estate, as used in the act, to include goods and chattels of every description, including steamboats and other vessels, money debts due or owing from solvent debtors, whether on contract, note, bond, or mortgage, public stocks and stocks in corporations, whether within or without this State.

The twenty-first section of the act of 1862 declared that the first, second, tenth, and eleventh sections of the act of 1854, and also the fourth article of the fifth section of said act, and also the supplement of 1857, and all other acts and parts of acts, whether special or local, or otherwise inconsistent with the provsions of the act, repealed.

This repealing clause, it will be seen, on an examination

of the act of 1854, leaves the third section defining the meaning of the term real estate, the fourth section defining the meaning of the term personal estate, the first, second, and third subdivisions of the fifth section specifying the property exempt from taxation, unrepealed.

All the sections and parts of sections, supplied and altered by the act of 1862, are thus repealed, and the remaining sections of the act thus pointedly left unrepealed relate to matters unregulated by the provisions of the act of 1862, such as the place where the personal tax shall be levied, the mode of making out the duplicates, the mode of assessing trustees, executors, administrators, and guardians, &c., &c.

Nothing can possibly be clearer than that the legislature meant to say that the unrepealed portions of the act were not substantially inconsistent with the act of 1862, and should stand except where modified by that act

If this be not so, there is no provision exempting the property of the United States, this State, counties, townships, cities, and boroughs, &c., from taxation, and many important matters are left without regulation.

These acts are all supplements to the act of 1846, are all in *pari materia*, and to be construed together, and when one of these acts declares that a certain word or phrase is to be construed as meaning a certain thing *in this act*, the term *this act*, or equivalent language, means the original act and its supplement. In contemplation of law, this act and its supplements are but one act for the purpose of construction.

The supplement is to be considered as added to the act, and making one with it, in ordinary legal phraseology they are said to be in *pari muteria*, and to be construed together. It results from this that the definitions of the terms *real and personal estate*, used in the act of 1854, are part and parcel of the act of 1862, and that stocks of corporations and public stocks, whether within this State or out of it, are taxable. If some new provision has been introduced in the act of 1812, plainly inconsistent with, and intended to supply the place of a corresponding provision of the act of 1854, the act of 1854 is *pro tanto* repealed. Of such a character is the provision of the 8th

section, taxing domestic corporations and exempting their stockholders from taxation.

By the act of 1854, foreign stocks are declared to be personal estate within this State when owned by residents here. There is nothing in the act of 1862 inconsistent with this construction.

The act of 1854 declared personal estate *within* this State taxable, as the act of 1862 also does. The act of 1854 in substance declares foreign stocks, when owned here, to be for the purposes of taxation, within the State, and thus closes the door against legal casuistry. If anything could make this point clear, it is the express repeal of the supplement of 1857, exempting foreign stocks when taxed abroad and the taxes paid, from taxation here.

The fourth point remaining is one of more difficulty, but I think the City Bank, upon a fair construction of the act, is exempt from taxation upon its State bonds and United States securities. The difficulty arises from the peculiar phraseology of the 8th section of the act, "That all private corporations of the State, &c., &c., shall be and are hereby required to be respectively assessed and taxed at the full amount of their capital stock paid in and accumulated surplus; but any real estate which such corporations may lawfully own in any other State shall not be liable to be estimated in such accumulated surplus; and the persons holding the capital stock of such corporations shall not be assessed therefor.

If this could be regarded as a tax upon corporations *as such*, and not upon their property, they could not claim exemption for non-taxable property held by them. Although the act might be oppressive, no reason is perceived for doubting its validity. It is competent for the Legislature, independent of any contract between them and the State, to tax them at discretion. But I think the act cannot be so regarded. The 8th section expressly exempts from estimation as a part of the surplus real estate owned in another State, and the 13th section provides for the taxation of the real estate of private corporations in the ward or township where it is located, and directs the amount of the assessment to be deducted from the amount of the capital stock and surplus and funded debt, or of the valuable

assets of the corporation. These provisions, in connection with the 8th section, show that the tax designed by the act was a tax upon *the property* of the corporation, not *its franchise.* The direction of the act is, in substance, that the amount of their personal estate, upon which the tax is to be laid, is to be conclusively ascertained by the amount of their capital paid in and accumulated surplus, deducting the value of their real estate owned in this State from the sum total, and their foreign real estate, when lawfully owned, from the surplus. The act was designed, doubtless, to cut off all other deductions and to furnish a plain rule by which to assess their property, without enquiring into their investments.

If the provision is equivalent to one declaring that, from this amount no deduction shall be made for New Jersey State bonds or United States securities issued by Government under the power to borrow money, but they shall be included in the amount at which they are to be taxed, it presents the question: Can the Legislature consistenly with the Constitution of the United States enact that corporations shall be taxed for the United States stocks and securities they hold? Nothing can be plainer than that it cannot. What it cannot do directly it cannot by mere circumlocution. A law taxing the aggregate, taxes all the parts of which it is composed, as effectually as if the parts were particularly mentioned. The act of Congress exempts these securities when held by corporations as well as by individuals from taxation by State authority. If it were necessary I should hold that this section so construed irrespective of other parts of the act, and the supplements in *pari materia,* was void, as in conflict with the United States. This may be avoided by holding that all property held by them, by other acts exempt from taxation (not capable of being repealed by this act) or by constitutional provisions exempt from taxation, are impliedly excepted, and to be deducted from the amount of the capital stock and surplus. The act is not to be interpreted so as to make it conflict with constitutional provisions where that can be avoided. As we have already seen, the whole series of acts on this subject are to be considered as one and construed together. A cemetery com-

pany, although having a stock paid in, would, under the second subdivision of the fifth section of the act of 1854, be entitled to have its grave-yard not exceeding ten acres exempt from taxation; so would a library company its library, an academy or seminary of learning its property, because the 5th section of the act of 1854 is unrepealed and in full force as modified by the 17th section of the act of 1862. And yet if we adhere to the strict words "full amount of their capital stock and accumulated surplus," these exemptions cannot take effect. The broad words of the 8th section are not to be understood without qualification by other parts of the act and the other acts on the same subject. By parity of reasoning, all other property protected by constitutional provision is also to be excepted.

We ought not to assume that the Legislature intended to lay a tax on property by the Constitution and laws of the United States exempt from taxation, where the intent has not been declared in unequivocal language. This is not the case here.

The bank is entitled to a deduction for the stock issued by this State, held by it; also for the bonds and notes of the United States in its hands, owned by it.

To recapitulate my conclusions:

I. The bonds issued by this State under the act of 1861, are exempt from taxation when held by individuals or corporations.

II. The stock and securities issued by the United States under the power to borrow money, are exempt from taxation in the hands of individuals or corporations.

III. Stocks in foreign corporations held by individuals resident in this State are personal estate within the State, and subject to taxation.

IV. Corporations are entitled to have deducted from the amount of their capital stock paid in and accumulated surplus, the amount of the bonds of this State, and the stock and public securities issued by the United States, owned by them at the time of assessment.

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IN THE

# COURT OF APPEALS.

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THE PEOPLE, *ex rel.* THE BANK OF THE COMMONWEALTH,
*vs.*
THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY OF NEW YORK.

This case came before the court on an appeal from a judgment of the Supreme Court, affirming on *certiorari* the determination of the commissioners of taxes and assessments, in assessing the relator, the Bank of the Commonwealth, for the year 1863. The relator is a banking corporation created pursuant to the general banking law. It caused to be delivered, in proper season, to the tax commissioners, a statement embracing the particular matters required by the statute to be stated; by which it appeared that its capital actually paid in, and secured to be paid in, was the sum of $750,000; that it had invested in real estate, consisting of its banking house in the first ward of the city, the sum of $188,099.84, leaving a balance of capital of $561,900.16. It further stated that the bank had loaned to the government of the United States the whole balance of its personal property, namely, the sum lastly above mentioned, "being the entire amount of their capital stock after deducting the amount paid for real estate as aforesaid, and that they have taken and hold for such loans the securities of the United States, being stocks, bonds, notes,

evidences of debt and securities for money." It therefore claimed to be exempt from taxation except for the value of its said real estate. The Commissioners rejected the claim to exemption, and the corporation was accordingly assessed the sum above mentioned in respect to real estate, and the whole balance of $561,900 as personal estate. The bank sued out a *certiorari* to the Supreme Court under the act of 1859, ch. 302, § 20.

The present appeal was from the judgment of affirmance in the Supreme Court of the proceedings of the Commissioners.

A. W. BRADFORD, *for the Appellant.**

JOHN E. DEVELIN and JAMES T. BRADY,
*For the Respondents.*

DENIO, Ch. J.—It must be considered a settled point that the power of taxation residing in the state governments does not embrace as a possible subject the securities of the public debt of the United States. The Supreme Court of the United States, the ultimate arbiter upon questions of federal power and constitutional limitations upon state authority, having so pronounced, it becomes the duty of the tribunals of the states, which, upon such subjects, are subordinate to the national court, to yield to the judgment implicit and unreserved obedience. The circumstance that we were unable to perceive the supposed repugnancy between the power of the states to tax all the property of its citizens, and the authority committed to the general government to become the borrower of money of any individual or corporation who might be willing to lend it, will not justify us in attempting to qualify or evade the plainly expressed opinion of the federal judiciary. I come to the consideration of the question involved in this case, therefore, unconscious of any bias arising out of the views which I entertained, and which I cannot avoid saying I individually still entertain, upon the power of the states over the

* Mr. Daniel Lord was also heard on the general question involved in the case, he being of counsel for the appellant in the case of *The People, ex rel. The Bank of Commerce*, v. *The Commissioners of Taxes, &c.*, which was argued on the same day and depended upon the same question.

subject of taxation for state purposes. The consideration that since the former judgment of this court, congress has seen fit to affirm, so far as it had power to do so, the construction by which the states are disabled from the full exercise of this power, by a positive inhibition to tax the property of our citizens invested in federal securities, would not change my opinion, if the principle were now open for consideration. The question as to the power of congress to intervene was not before us on the former occasion, as no such act had then been passed, and we therefore avoided all expression of opinion on that subject; but if the states were not restrained by the Constitution itself, I think it was not in the power of congress to impose, by its own authority, a limitation of the power of the state legislatures over the subject. But dismissing this question as one settled against our opinions by the supreme tribunal, the point now to be considered is: whether the effect of the state law which was in force when the determination under review was made, did assume to tax the securities of the general government in the hands of the banks, or, in other words, whether the assessment which is in controversy was upon these securities or not.

The statute of this state on which the question arises, was passed on the 29th of April, 1863, and took effect immediately upon its passage. It is in these words: "All banks, banking associations, and other moneyed corporations and associations, shall be liable to taxation on a valuation equal to the amount of their capital stock paid in or secured to be paid in, and their surplus earnings (less ten *per cent* of such surplus), in the manner now provided by law, deducting the value of the real estate held by any such corporation or association and taxable as real estate." (Ch. 240.)

The force of the words *paid in or secured to be paid in*, if otherwise obscure, will be understood by a reference to the legislative history of banking in this state. When banks were created by special charter, the amount of capital stock and the number and amount of shares was stated in the act,

and it was usually or at least sometimes provided that the institution might go into operation when a given number of shares less than the whole had been subscribed. So when the general banking law came to be passed, the articles of association were required to state the amount of the capital stock; and authority was given to increase it. (Laws 1838, ch. 260, §§ 16, 20.) Then the periodical statements required to be made, were to specify "the amount of the capital stock paid in * * * or secured to be paid." (§ 26.) So in regard to the chartered banks; they were to specify, in their statements, "the amount of the capital stock of the corporation paid in or invested, according to the provisions of its charter, and the amount of such stock *as then possessed.*" (2 R. S., 593, § 20.)

The distinction between capital originally paid in or secured, and that possessed at a particular time, is sharply defined in various provisions. For instance, in the limitation of the amount of loans and discounts: they are not to exceed three times its capital stock, then paid in and *actually possessed.* (Id., p. 589, § 1, subd. 8.) So in the safety fund act, there is a limitation as to the circulating notes which may be issued, which are not to exceed twice the capital stock then paid in *and actually possessed.* But when the taxation of this class of corporators come to be provided for, it is the capital stock "paid in and secured to be paid in," which is to be stated by the corporate officers to the assessors, and set down in their assessment rolls, and upon this the tax is to be imposed (1 R. S., 414, 415, 416, §§ 1, 6, 10); and the same expression was used in the same connection in the act under immediate consideration. This amount of capital fixed by the charter or articles of association, and either actually paid in or secured to be paid in, is wholly irrespective of the moneys, securities and property which the corporation may at any given time possess, and it may be a greater or less sum, varying from time to time, as it necessarily must, according to the vicissitudes of business and the success of the enterprise. It is usually called the nominal capital, to distinguish it from the amount of the positive assets which may constitute the

actual capital at any particular period. The interest of the stockholders, called shares, are aliquot parts of this nominal capital, and they are said to be at par when the actual property or investment are supposed to be equal to the amount paid in or secured to be paid, or, in other words, to the nominal capital, and to be above or below par, as the actual capital shall be increased or diminished.

The assessment or valuation, which by the Revised Statutes, is to constitute the taxable personal property of the corporation, is the amount of this nominal capital, after there has been deducted from it, the amount paid out for real estate, and the amount of stock, if any, belonging to the state and to literary and charitable corporations. (1 R. S., 415, §§ 6, 7.) Whatever may have been the effect of these provisions, if they had remained unchanged, upon the question we are considering, it is very clear that the same effect must be attributed to the act of 1863.

Between the time of the enactment of the Revised Statutes and the passage of the act of 1863, a very great alteration in principle was made in the method of assessing and taxing this class of corporators. By the act of 1857 (ch. 456, § 3,) the mode of arriving at the valuation upon which the tax was to be levied, was altered in an important respect. Instead of taxing the nominal capital, expressed by the words capital paid in or secured to be paid in, the officers were required to assess the capital stock at its actual value. There were certain deductions to be made from that actual value, which are not necessary to be now stated. The principal feature of the alteration, was the departure from the nominal amount or the sum which had been originally paid in or secured to be paid in, as the taxable valuation, and the substitution of the real or actual value of the capital, that is, the moneys and other property, independent of the real estate of the corporation possessed by it when the assessment is made. It was a change from a valuation to some extent fictitious, to one, to be obtained by actual inquiry, appraisement or other evidence, to be resorted to by the assessors The system established by the

act of 1857 was abolished by the act of 1863, and was superseded by the arrangements of that act. I cannot bring myself to entertain any doubt that the intention of the legislature in passing this last mentioned act was to return substantially, and so far as this question is concerned exactly, to the system of the Revised Statutes. The nominal capital which was defined by the same precise words used in the Revised Statutes, were again made use of to describe the taxable valuation upon which the corporation was to be taxed. In declaring that such corporations should be liable to taxation upon a valuation equal to the amount of their capital stock paid in and secured to be paid in, they effected the same object which the Revised Statutes had accomplished in enacting that the capital stock paid in and secured to be paid in, should be inserted in the column of the valuations of personal estate, and that the capital as thus valued and entered should be taxed like other real and personal estate. The language is well and aptly chosen to denote a return to a system of valuation and taxation which had been firmly established by the Revised Statutes, and had been departed from by the act of 1857. Some emphasis has been placed in the argument, upon the word *valuation* as used in this act, as though it indicated that an estimate or appraisal of the capital of the company was to be made, at the time of assessing the corporation. But a little regard to the phraseology of the tax laws will show that the columns of the taxable amount of the real and personal estate of the taxpayers are the *valuations* of the real and personal estate of the several taxpayers and the aggregate is the valuation of the counties. A reference to 1 R. S., pp. 395 and 417, §§ 34 and 16, will make this very plain. The words "on a valuation equal to the amount of their capital stock," &c., mean nothing more than if it had been said the corporation shall be taxed on an amount equal to their capital stock paid in, &c.

I ought to mention that besides what I have called the nominal capital of the corporations, their surplus earnings are by this act of 1863, to be added to the taxable valuation where

they exceed 10 per cent of their capital. This was a departure from the provisions of the Revised Statutes, and was first made in an act passed in 1853. (Ch. 655.) I donot perceive that this affects the question to be decided. The principal subject to be taxed is, after all, the nominal capital, and this is the precise taxable valuation in all cases where, as in this case, there is no surplus. To ascertain the existence of a surplus, a judgment must, no doubt, be exercised upon the amount of the capital on hand, but the only change which is to be made, in case a surplus beyond the amount mentioned is ascertained, is to add that surplus to the nominal capital.

Having thus established that the act of 1863, was simply a revival, with a single change, not material to this question, of the system of valuation of the personal property established by the Revised Statutes, we are to determine what the effect of that system was upon the taxability of federal stocks held by the banks at the time the assessors make their annual inquiries preparatory to the making up of their assessment lists. It would seem plain enough that it is entirely immaterial what the assets of the bank then are. If the amount of the original nominal capital is alone to be taken into account, it would be officious and improper, or at least useless for the assessors (or the tax commissioners in the city of New York) to make any examination or inquiry into the actual assets. The Revised Statutes required the bank officers to make and deliver a statement of the amount of the nominal capital, under the name of their capital stock, paid in or secured to be paid in (1 R. S., 414, § 2); but they gave no such direction respecting the capital or assets then possessed. The distinction between these two items was, at that time, well understood, as has been shown by the references to the statements required for other purposes, and to the limitations upon discounts and issues. It has been settled, by repeated adjudications, that the loss of any part of the original capital of a bank, such loss existing and known at the time of making the assessment, would not influence in any respect

the amount of the taxable valuation; and, prior to the change made by the act of 1853, that any increase of the assets of a bank, by means of reserved profits, would not increase in any way such taxable valuation. (*The Bank of Utica* v. *The City of Utica*, 4 Paige, 399, Anno 1834; *The People* v. *The Board of Supervisors of Niagara County*, 4 Hill, 203; *The Farmers' Loan and Trust Company* v. *The Mayor, &c.*, 7 Hill, 261; *The Oswego Starch Factory* v. *Dolloway*, 21 N. Y., 449.) These cases, except the last, were adjudged many years since, and the one in the seventh volume of Mr. Hill's reports was determined in the Court for the Correction of Errors. In the first of them the bank had accumulated a large surplus, beyond its original capital, which the local officers had assumed to assess; and in the one against the Farmers' Loan Company, that corporation had lost more than half of its large capital, yet it was held, in both instances, that these considerations did not at all affect the taxable valuation. which was, notwithstanding, to be set down as the capital originally paid in and secured to be paid in. The basis of these adjudications was, that the statute had determined what the taxable valuation should be, by a reference to the nominal capital, and had thus precluded any inquiry as to the property actually possessed at the time of making the assessment. The tax is not assessed upon the property or capital possessed at the time the annual inquiries are made by the proper officers, but upon an amount originally contributed to the corporate enterprise. This was fixed upon, somewhat arbitrarily, it may be said, as representing, with sufficient practical accuracy, the sum upon which the public burdens ought to be assessed against the corporation. We have seen that if the sum of this original contribution should be diminished to any extent by losses, or depreciation of securities, no corresponding diminution was to be made in the assessed valuation. The reason for this was, that the existing assets formed no part of the subject by which, according to the statute, that valuation was to be determined. Another criterion, namely the original capital, was to be taken as

representing the taxable value. This reason equally excludes any inquiry into the existing assets, with a view to ascertain whether any part of them are, in their own nature, not subject to taxation. The existing property and securities have, in truth, nothing to do with the question. Hence, if it could be shown that the discounted paper held by a bank, or the currency notes in its drawers, were forgeries, and consequently worthless, the assessors could not regard that circumstance, because the existing assets do not enter into the question, and are no part of the data by which the taxable valuation is to be ascertained. And, for the same precise reason, when it was shown, on behalf of the bank which is concerned in this appeal, that its securities were not in their nature taxable property, the circumstance becomes utterly immaterial, since neither the character, nor amount of such securities, have any thing to do with the questions which the taxing officers were to determine.

The counsel for the relator has derived an argument from the declaration of the Revised Statutes, made at the outset of the regulations respecting taxation, that all lands and all personal estate within this State, whether owned by individuals or by corporations, shall be liable to taxation. (1 R. S., 387, § 1.) The general principle thus announced, if there were nothing to qualify it, would undoubtedly indicate that the existing personal estate and securities of a banking corporation would be the subjects of taxation. Yet, it being a part of the system at the same time established, that the personal estate of these corporations should be the same as the original capital, it was found necessary to qualify this elementary principle by a definition to the effect that the term *personal property*, in its application to this class of corporations, should be construed to include such portion of the capital as should not be invested in the real estate. (Id., 388, § 3.) That the term capital, as here used, is to be interpreted as original or nominal capital, is evident from the detailed provisions contained in a subsequent part of the regulations, where that term is, for the purpose of taxation, more distinctly defined. I refer, of course, to the

direction contained in the title devoted to the assessment of taxes on incorporated companies, where it is provided that their capital stock paid in, and secured to be paid in, with the deduction for real estate purchased, is that which is to be reckoned as the valuation of the personal estate. (Id., 415, § 6, &c.)

Now, it has been said, on the argument, with entire truth and accuracy, that the principle of our laws for the assessment and collection of taxes, looks to the taxation of all property of the taxpayers, whether corporate or individual (with the exception, originally made, of certain favorite business enterprises) upon an *ad valorem* rule. The introductory declaration just referred to is evidence of this. The manner of assessing corporations was not intended practically to form an exception to this rule, and in many cases it would not. It was, no doubt, supposed that the original contributions of the stockholders would represent with sufficient practical accuracy the existing personal estate of the corporations. If they retained their original capital, and periodically divided the profits realized, there would, in the prescribed method of taxation, be no departure from the principle; and the occasional fluctuations by which the capital could be temporarily diminished, or the assets increased, it was probably supposed would balance each other. If a permanent loss of capital to a considerable amount should be encountered, the remedy was by an application to the legislature to reduce the capital, so as to make it correspond with the actual assets. The examples of this have been frequent. Where this was not done, the prescribed rule of valuation, though to a certain limited extent fictitious, would not practically violate the *ad valorem* principle. As a system, it was made somewhat more unequal by the provisions of the act of 1853, continued in the act we are considering, which added the surplus profits, when to a certain amount, to the taxable valuation. The consideration that ten per cent of an accumulated surplus of earnings were allowed to escape taxation, shows that the rule of taxing all property at its real value, was

not intended to be an inexorable one. While it was the general principle, it was made to sometimes yield to considerations of convenience; but such departure was not, it may be supposed, considered as a material modification of the principle.

I find, in the opinion of the Supreme Court, in this case, an elaborate and very able argument to show that even, under the act of 1857, which professed to tax the capital of banks at its actual value, these institutions could not claim an exemption from taxation on account of their possession of federal securities, even conceding that such securities were generally exempt from taxation, under the Constitution of the United States. It is not necessary, in the view I have taken, to consider that question. If the learned judge who prepared that opinion was right, *a fortiori*, the act of 1863, which provides for a return to the system of the Revised Statutes, excludes any pretence for an exemption, on account of the possession of these securities. It seemed to me, when the question was before us, in 1861, that the system of assessing the capital, at its actual value, would authorize an inquiry whether any of the property of which that value consisted was legally exempt from taxation, and that, if found to be so exempt, that it ought to be deducted from the aggregate taxable valuation. The judges of this court were not unanimous upon that point; there being a sufficient number to give a judgment who were of opinion that the federal constitution did not contain any inhibition against the taxation of the national securities in the hands either of individuals or corporations, the judgment was placed wholly upon that ground. The Supreme Court of the United States must, I think, have concurred in the view that I entertained, for otherwise the constitutional question would not have been reached. The judges had first to decide that the assessment was upon the United States stock, before they could reverse our judgment which subjected the stock to the state tax. A state court could not preclude the jurisdiction of the federal court by an incorrect holding, that the constitutional question sought to be made did not arise.

The foregoing observations are designed to show, that the law of this state, under which the assessment in controversy was made, did not provide for the assessment of this stock among the mass of the property of the corporation; that the assessment was upon another subject, namely, the original capital, and that thus the immunity of the federal stock from taxation was not an element of the determination made by the commissioners of taxes in this case.

But it is argued, that if this were conceded to be so, it would then appear that the act of 1863 was a premeditated evasion of the judgment of the national court which ought not to prevail; for what the legislature cannot do directly it ought not to be allowed to do at all. The force of this argument is somewhat weakened by the consideration, that the provisions of that act were only a return to the system of the Revised Statutes, which regulated the subject in this state for nearly thirty years. Still, it is not to be disguised that the system was revived in 1863, with a view to prohibit the banks from availing themselves of an advantage which every natural person and the other classes of corporation were entitled to. It was a measure apparently hostile to the banks and other corporations embraced in the act, though doubtless originating in considerations of public policy. The exemption of the immense amount of these securities, held by the banking institutions, will no doubt prove very onerous to the owners of the other property liable to taxation. This is a necessary consequence of the immunity conferred upon federal stocks by the constitutional construction to which I have referred. It seems to me to afford no reason for so shaping state legislation, as to discriminate in a hostile spirit against the investments of moneyed institutions. But we have to deal with the law as we find it written; and I think the appropriate answer to the argument, which assumes that the act of 1863 is an attempt to do by indirection what could not be done plainly and directly, is, that the arrangements for state taxation are within the uncontrollable discretion of the legislature, whose motives are not subject to the criticism of the courts.

If a certain effect shall be found to flow from taxation of one particular subject instead of another, the inconvenience must be submitted to, unless the legislature will consent to change the rule. I have personally no sympathy with hostile legislation aimed at particular interests existing under the authority of the laws; but this court has not, as I have said, any jurisdiction to pass upon the motives of the legislative branch of the government, when no constitutional right is violated; and there is no constitutional provision which declares that taxes shall be assessed equally, and according to value, upon all the property of the citizens of the state.

The point is made in one of the cases of this class that the tax commissioners were not entitled to recover the costs of the proceedings on *certiorari* in the Supreme Court. The 303d section of the Code abolishes all former laws respecting costs; and provides for the awarding of sums by way of indemnity to be called costs in certain actions; and the following sections down to § 318, make various provisions respecting the amount to be awarded, under different circumstances, and concerning the fees to be allowed to the several officers of courts; among which provisions it is declared that a certain allowance is to be made to either party for the trial of an issue of law, in the action in which costs are given. The 318th section declares, that "when the decision of a *court of inferior jurisdiction* in a special proceeding, including appeals from surrogates' courts, shall be brought before the Supreme Court for review, such proceedings shall for all purposes of costs be deemed an action at issue on a question of law, from the time the same shall be brought into the Supreme Court, and costs shall be awarded and collected in such manner as the court shall direct, according to the nature of the case." I am of opinion that this board of tax commissioners cannot be considered a court in the sense of this statute. Administrative boards are not termed courts either in common or in legal parlance. Nor do I think that the application to the tax commissioners, of a citizen or corporation, to correct an assessment, is a *special proceeding*

within the definition of the Code. (§§ 2, 3.) I think the *remedy* there referred to is some judicial proceeding before a judicial magistrate, and that the determinations of administrative boards are not embraced in the term. Costs should not upon principle be given in such a case. The character of the proceeding is rather administrative than judicial, and the resort to the Supreme Court under the statute, is of the same general nature as the application by the taxpayer to the tax commissioners. No costs can be awarded in such a case, unless the statute expressly gives them.

I am of opinion, therefore, that so far as this judgment awards costs to the commissioners, it should be reversed, and in all other respects affirmed, and that there should be no costs in this court.

DAVIES, SELDEN, INGRAHAM and HOGEBOOM, JS., concurred.

JOHNSON, J.—Under our statute, as it now stands, banks and banking associations are made liable to taxation "on a valuation equal to the amount of their capital stock paid in or secured to be paid in." This clearly does not contemplate a tax upon the franchise, as such, or upon the person or poll of the corporation in the nature of a poll tax, but upon the taxable property of the corporation. The design obviously was to fix and determine the standard by which the valuation should be made, by the assessors or tax commissioners, of the taxable property which the corporation owned and possessed at the time of such valuation.

I am unable to bring my mind to the conclusion that the legislature intended, by the act in question, to place the liability of these institutions to taxation, upon what they once had, without any reference whatever to the taxable property owned and possessed by them at the time of the assessment or valuation. The language of the act, as it seems to me, leads to no such conclusion. They are made liable to taxation, not *upon* their capital stock originally paid in or secured to be paid in, but upon a valuation equal to the amount of such original capital stock paid in or secured

to be paid in: that is upon a valuation of their assets, liable to taxation, by a fixed and arbitrary standard of valuation. The capital stock paid in, or secured to be paid in, is referred to, not as the subject or object of taxation, but as a rule or standard of valuation, merely for the purpose of fixing the amount of the tax which the institution is to pay upon its taxable property. Prior to the passage of the present act, such corporations were liable to be taxed for capital stock upon a valuation at its actual value. The only change made by the present act, in this respect, as I conceive, is, in the measure or standard of valuation.

By this act, as I understand it, if a bank or banking association has any capital or surplus earnings subject to taxation, whatever may be its amount or actual value, it is liable to be taxed, and must be taxed upon a valuation equal to the entire amount of the capital stock paid in or secured to be paid in. The assessors or tax commissioners have no discretion, but are bound to adopt the statute valuation. They have no judgment or discretion in the matter of value to exercise, but must conform their valuation strictly to the requirements of the statute. The statute stands as their judgment of the value of the capital of the bank, if they have any capital liable to be taxed, even if a portion of it has been entirely sunk and lost or invested in securities exempt from taxation according to the laws of congress.

All that the assessors or tax commissioners are authorized to deduct is the value of the real estate owned by the bank and liable to taxation as such. This was expressly held by the late Court for the Correction of Errors in this state, in the case of *The Farmers' Loan and Trust Company* v. *The Mayor, &c., of the City of New York* (7 Hill, 261). That case arose under the provisions of the Revised Statutes, in which the rule for the valuation of the capital of institutions of this description was almost identical with that prescribed by the act in question. In that case it was contended that inasmuch as a large portion of the capital had been lost, and another portion was invested in the stocks of other

corporations and liable in that condition to taxation in such corporations, those portions should be deducted from the valuation and the tax laid upon the company for the residue only. But the court held that the valuation must be according to the rule or measure prescribed by statute, whatever might have become of a portion of the capital of the company. That decision applies to this case, and, in my judgment, is decisive of it. I agree fully, that if any bank or banking association is shown to have its entire capital and surplus earnings invested in securities which, by the law of congress are exempted from state taxation, it cannot lawfully be taxed or its property valued for the purpose of taxation. The law of congress upon this subject is the supreme law of the land, and any state law in opposition to it is entirely nugatory. It is perfectly well settled that congress has the power to exempt securities issued by the Government of the United States from taxation by the states, and hence if a state undertakes, by its laws, to impose a tax upon such securities, such laws must be void.

But it is not shown by anything in the present case that the entire capital of the bank and its surplus earnings are invested in securities of that character. It is for the bank or association claiming the exemption, to show affirmatively, and with entire clearness and certainty, that its entire capital and surplus earnings are thus invested. Otherwise the legal presumption must be that that they have something not exempt, and the assessors are bound to assess and make the valuation according to the statute. This, I think, is not shown in this case. It only appears what amount the bank has thus invested. That an amount equal to their capital has been invested does not show that the whole capital has been thus invested. It may have made the investment with the funds of others for which it is liable. For aught that appears by the return, the bank has still specie in its vaults, which is part of its capital, and this is clearly liable to taxation as capital. It may also, for aught that appears, have other portions of its capital stock, or surplus earnings, not thus

invested. If it had coin in its vaults we should hardly presume it was not the property of the bank but belonged to its depositors. If such was the fact, it was for the bank to show it affirmatively. As this is not shown, and as it does not appear by the record before us that the bank had nothing, either of capital or surplus earnings, but what was invested in these exempt securities, I am of the opinion that it was legally taxed.

If, as I have said, it had anything which was the subject of taxation, not exempt by any law, either of congress or of this state, it was liable to be taxed, and could be taxed only upon the valuation prescribed by the statute. In such case the law will not presume that the tax was laid upon the exempt portion of its capital but upon that portion which was not exempt, as the rule of valuation must be the same, whether a portion was exempt or not. For these reasons, I am for affirming the proceedings of the commissioners.

MULLIN J., (dissenting). In order to a correct understanding of the questions arising on this appeal, a brief history of the legislation of the state upon the subject of the taxation of corporations is necessary. Prior to 1823, there was no statute regulating the taxation of these institutions. The supreme court held in 1817, in the case of the *Clinton Woolen Company* v. *Morse*, cited in the *People* v. *The Utica Insurance Company* (15 J. R., 382); that corporations were taxable on their property, in the same manner as persons, notwithstanding the statute regulating taxation mentioned persons only, as liable to be assessed, and the term *corporation* was not used.

In 1823 an act was passed providing amongst other things, that all incorporated companies receiving a regular income from the employment of their capital, should be considered *persons* within the meaning of said act, and assessed accordingly. Under this act they were assessed for the property they owned, both real and personal, precisely as individuals were assessed, and without regard to the value of their capital stock. (See Laws of 1823, p. 395, § 14.)

In 1825, the preceding act was amended (see Laws of that year, ch. 254, sec. 1), and it was provided that it should be the duty of assessors to insert in the assessment rolls the name of each incorporated company liable to be taxed, and the amounts of its capital paid in, or secured to be paid in, and should designate how much of it is in real, and how much in personal property, and how much was deducted by reason of stock owned by the state, or by literary or charitable incorporated companies.

The Revised Statutes adopted the principle of taxation of corporations introduced in the preceding act. By sec. 1, title 4, chap. 13, part 1st of those statutes, it was provided that all moneyed or stock corporations deriving an income or profit from their capital, or otherwise, shall be liable to taxation on their capital, in the manner thereinafter prescribed.

The next section required the president or some other one of several officers enumerated, to make and deliver, on or before the 1st of July in each year, to the assessors of the town or ward in which such company is liable to taxation, a written statement specifying,

1st. The real estate, if any, owned by such company, where situated, and the sums paid therefor.

2d. The capital stock actually paid in and secured to be paid in, excepting therefrom the sums paid for real estate, and the amount of such capital stock held by the state, and by any incorporated literary or charitable institution.

3d. The place where the principal office, or place of transacting the financial business of the company is situated.

The third section required a similar statement to be delivered to the comptroller, on or before the 1st July in each year.

Section 6 required the assessors to enter all incorporated companies from which such statements shall have been received, and *the property of such companies and the property of all other incorporated companies*, liable to taxation, in their assessment rolls, in the following manner:

1st. In the first column the name of each incorporated company in their town liable to taxation, on its capital or

otherwise, and under its name the amount of its capital stock paid in and secured to be paid in, the amount paid by it for real estate then belonging to such company, and the amount of its stock belonging to the state and to incorporated literary and charitable institutions.

2d. In the second column the quantity of real estate owned by such company in such town, and in the third column the actual value thereof.

3d. In the fourth column the capital stock of every incorporated company, except manufacturing and turnpike corporations and marine insurance companies, paid in and secured to be paid in, after deducting the sums paid out for all the real estate of such company, and the amount of stock held by the state and by literary and charitable institutions.

The 7th section required the assessors to insert in the column above mentioned *the cash value of the stock of all manufacturing and turnpike corporations, to be ascertained by the sales of the stock or in any other manner*, deducting therefrom the items hereinbefore mentioned, which value, together with the value of the real estate, shall constitute the amount on which the tax shall be assessed.

By the 10th section it is declared that the capital stock of every company liable to taxation, except such part as shall be excepted in the assessment roll and by the preceding sections, shall be assessed and taxed in the same manner as the other real and personal estate of the county, unless such company commute.

The 18th section provides that the taxes so assessed shall be paid out of the funds of the company, and shall be ratably deducted from the dividends of those stockholders whose stock was taxed, or shall be charged upon such stock if no dividends be afterwards declared.

We now come to the act of 1857, chapter 456, by which the preceding provisions were in some respects materially changed. Section 3 of that act is in the following words: "The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll, or as shall have been exempted by law,

together with its surplus profits or reserved funds exceeding 10 per cent of its capital after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable on their capital stock under the laws of this state, shall be assessed at its actual value in the same manner as other real and personal estate of the county.

From this brief outline of the legislation of the state on the subject of corporate taxation, it will be seen that it has undergone two radical changes. It was first on the property, next on the capital stock paid in, and third, upon its actual value at the time of the assessment; and under each and all of these systems, the obvious intention was to assess property only.

The third section of the act of 1857 was in force in 1859, when the commissioners of taxes, &c., for the city of New York assessed the Bank of the Commonwealth of said city on its whole capital paid in and secured to be paid in, less so much thereof as had been paid out for real estate, and refused to deduct from the amount assessed the sum of $103,000 invested in the stocks of the United States, and which stocks were actually owned by the bank at the time the tax was assessed. A *certiorari* was issued out of the supreme court, on the application of the bank, directed to said commissioners, requiring them to make return thereto, and the commissioners did return thereto the facts aforesaid. And the said court, after hearing counsel, affirmed the proceedings, upon the ground that the tax was really upon the stock of the corporation and not upon the property in which the money paid in by the stockholders was invested. An appeal was thereupon taken to this court. After argument, the judgment of the Supreme Court was affirmed. It was held by the majority of the court:

1st. That stock in the public debt of the United States, whether owned by individuals or corporations, is taxable under the laws of the United States.

2d. That taxation by the state of property invested in a loan to the Federal government is not forbidden by the con-

stitution of the United States, when no unfriendly discrimination to the United States, as borrowers, is applied by the state law; and property in its stock is subjected to no greater burdens than property in general.

An appeal was taken from the judgment of this court to the Supreme Court of the United States, and it was by that court reversed. NELSON, J., delivered the opinion of the court. He commences his opinion by saying that "the question involved in this case is whether or not the stock of the United States constituting a part or the whole of the capital stock of a bank organized under the banking laws of New York is subject to state taxation. The capital of the bank is taxed under existing laws in that state upon a valuation like the property of individual citizens, and not as formerly, on the amount of the nominal capital without regard to loss or depreciation. According to that system of taxation it was immaterial as to the character or description of property which constituted the capital, as the tax imposed was wholly irrespective of it. The tax was like one annexed to the franchise as a royalty for the grant. But since the change of this system it is agreed the tax is upon the property constituting the capital.

This stock, then, is held by the bank the same as such stocks are held by individuals, and alike subject to taxation or exemption by state authority.

After stating the grounds upon which it was sought to distinguish the case before him from *Norton* v. *The City Council of Charleston* (2 Peters, 449), the learned judge proceeds: "It will be seen, therefore, that the distinction claimed rests upon a limitation of the exercise of the taxing power of the state; that if the tax is imposed indiscriminately upon all the property of the individual or corporation, the stock may be included in the valuation; if not, it must be excluded or cannot be reached."

The reason why the states may not tax the stocks of the federal government, is, that it is a tax upon the exercise of the power of congress to borrow money on the credit of the United States, and the exercise of such power is interfered

with to the extent of the tax imposed. The tax was declared to be a violation, not of an act of congress merely, but of the constitution of the United States, and therefore void.

It will be remembered that the tax thus declared void by the federal court was assessed under the act of 1857, upon the *capital stock of the corporation at its actual value.*

These propositions must be deemed to be decided by the case of the *People* v. *The Bank of the Commonwealth.*

1st. That a tax on the capital stock of a corporation at its actual value is a tax on the property actually owned by the corporation at the time the tax is assessed.

2d. That when such property consists in whole or in part of the stock of the United States, it is exempt from taxation; and

3d. A tax on such stocks, being the property of a corporation, is unconstitutional and void.

After the reversal of the judgment of this court by the Supreme Court of the United States, and in 1863, the legislature of this state passed an act entitled "An act in relation to the taxation of moneyed corporations." See chapter 240 of the Laws of 1863.

By the first section of that act it is provided "*that all banks and banking associations, and other moneyed corporations and associations shall be liable to taxation on a valuation equal to the amount of their capital stock paid in or secured to be paid in,* and their surplus earnings less 10 per cent of such surplus in the manner now provided by law, deducting the value of the real estate held by such corporation or association and taxable as real estate."

Banks from and after the passage of said act are liable to taxation on a valuation equal to the amount of their capital stock paid in. A valuation of what? Of its property? If so then the stocks of the United States owned by the bank are, under the decision of the federal court above cited, taxed in manifest disregard of that decision.

If the valuation contemplated by the act is of the *stock* of the bank, the case is still within the one cited, for in that case the assessment was on the *capital stock at its actual value.*

If there is to be a valuation, it must be a valuation of property of some sort, and if it is of neither the capital nor property of the corporation, I am unable to understand what the subject of valuation is that is intended by the act referred to.

It is said that the words "shall be liable to taxation on a valuation," are wholly unmeaning, that the act of 1863 is to be read as if no such words were in it, and that the intention of the legislature was to restore the provisions of the Revised Statutes of 1830; the act of 1857, introducing, as it is said, a new rule of taxation.

Whoever will refer to the reports of the Comptroller since 1830, will find repeated complaints against the injustice of the rule of taxation prescribed by the Revised Statutes. It was found that under them corporations were sometimes taxed upon the full amount of their capital, when the largest part of it had been lost, and when, so far from deriving a profit from their capital they were running in debt.

The courts had held that if a corporation, was in the receipt of *any* income from it, it was liable to be assessed on its whole capital, although one-half or two-thirds might have been lost by the vicissitudes of business. *Bank of Utica* v. *City of Utica*, 4 Paige, 399; *Farmers' Loan and Trust Co.* v. *The Mayor, &c., of New York*, 7 Hill.

It was to remedy this injustice that the act of 1857 was passed, whereby the *actual* instead of the *nominal value* of the capital stock was adopted as the measure of taxation.

Although the act of 1863 does not declare what is the subject of valuation, the doubt, if any, is removed by reference to other provisions of the statutes relating to taxation. By § 1, title 1, chapter 13, part 1st of the Revised Statutes, all lands and all personal estate within this state are declared liable to taxation.

Section 3 of the same chapter declares that the terms "*personal estate*" and "*personal property*" whenever they occur in said chapter, shall be construed to include all household furniture, &c., stocks in moneyed corporations. "*They shall also be construed to include such portions of the*

*capital of incorporated companies liable to taxation on their capital as shall not be invested in real estate.*"

It was *property* that the legislature intended to tax, and that property was, first, the real estate of the corporation, and second, its stock, at a valuation equal to the amount paid in or secured to be paid, less the amount paid for its real estate and stock held by certain corporations. This was the measure of valuation of what the legislature had just declared to be the personal estate of the corporation.

The valuation is to be made from year to year, and it must necessarily be of the stock, at the time when each assessment is made, and it is none the less a valuation because the statute instead of the assessors ascertains and fixes the value. For these reasons I do not think it was the intention to revive the system of taxation introduced by the Revised Statutes. The measure of valuation only was revived.

But assuming that the act of 1863 is to be taken to be a restoration of the system of taxation under the Revised Statutes, I still deny that the tax is not assessed upon the property of the corporation. We have first the general provisions of the tax laws that real and personal property is the subject of taxation. This excludes the idea that franchises are the things to be assessed and taxed. Next we have the residue of the capital stock of corporations after deducting the cost of their real estate, declared to be personal property within the intent and meaning of the same law. In view of these provisions it cannot be said that it was the intention of the legislature to tax some ideal thing, existing only in the imagination, and disregard wholly the provisions to which I have just referred.

I have shown that before 1823 the *property* owned by corporations was taxed in the same way and to the same extent as that of persons. The act of 1823 recognized and adopted that method of taxation. The Revised Statutes requires the taxation to be upon the capital, declaring so much of that capital to be personal estate as remained after deducting the sum paid for real estate. The reasons for this change are obvious. When a corporation was organ-

ized, the amount of its capital stock paid in was taken from the individual corporator and transferred to the corporation. This amount, unless subjected to assessment against the corporation, would be relieved from taxation altogether, and thus injustice done to other taxpayers of the state. If the tax was assessed directly on the property of the corporation as it existed when the assessment came to be made, the debts of the company must be deducted and inquiry made into the profits or losses in its business. Such inquiries would involve assessors in great difficulties, and instead, therefore, of assessing the items of property owned by the corporation, its *stock* is made the subject of assessment.

It will be seen by reference to the provisions of the Revised Statutes above cited, that a distinction is made in the measure of assessment between manufacturing and turnpike corporations and other incorporated companies. Manufacturing and turnpike corporations are, like all other corporations, required to be assessed on their *capital*, but it is on the *capital at its cash value in the market.* Moneyed corporations were required to be assessed on the amount of capital paid in or secured to be paid in, after making certain specified deductions.

Both classes of corporations were taxed on capital, but that capital was not measured by the same standard of valuation. In the one case it was the actual cash value, in the other the amount paid in without regard to its value or the profits made or losses sustained by the corporation.

The act of 1857 adapted and applied to all moneyed corporations the provisions of the Revised Statutes in relation to manufacturing and turnpike corporations, which required the assessment to be made on the actual value.

Is the subject of taxation changed because the measure of valuation is altered? If the property of a corporation is actually assessed when its stock is entered in the assessment roll at its cash value, is not the same property taxed when its stock is valued at the amount originally paid or secured to be paid in? If the assessors found the value of

the stock of a manufacturing company to be equal to the amount originally paid in, and the assessment on that basis is, in fact, a tax on the property then owned by the corporation under the decision of the federal court in the case of the *Bank of the Commonwealth*, cited, *supra*, a tax on the capital of a bank at its par value is also an assessment on its property within the same decision. It seems to me impossible to distinguish the cases.

As I have already suggested, there was a propriety as well as necessity for the establishment of a fixed and arbitrary measure of valuation of corporate stock, arising from the difficulty in the case of moneyed corporations of arriving at actual cash value. Such arbitrary rule of valuation might, in many cases, work injustice by assessing property as existing that had been wholly or principally lost. But if profits were made, if the market value of the stock exceeded the par value, the moneyed corporation escaped taxation on such excess, while the manufacturing and turnpike corporation would be assessed upon the cash value of the stock when the same was above as well as when below par.

The act of 1863 is more severe upon moneyed corporations than were the provisions of the Revised Statutes. Under the latter the surplus profits or reserved funds were not subject to assessment, but under the act of 1863 they are liable to be assessed.

If the act of 1863 does not assess the property of the corporation, why are these surplus profits subjected to assessment? They are no part of the capital stock paid in or secured to be paid in, as these words are understood by those who insist that the capital stock and the property of the corporation are not one and the same thing. If these surplus profits are invested in stocks of the United States they are surely exempt from taxation, and what good reason can be assigned why they should not also be exempt when they are purchased with capital?

The words capital and capital stock are used in several different senses as well in the statutes as in common par-

lance. The sum specified in the charter of a corporation as the amount of money which it must have subscribed in order to authorize it to exercise its franchises, is called *capital stock.* Again, this amount when paid in by the corporators is called the capital stock. But the more accurate definition of the words is given by this court, in the case of the *Buffalo Mutual Insurance Company* v. *Supervisors of Erie* (4 Comst., 442), in which it was held that the stock, or capital stock, of a corporation *is the fund or capital, consisting of money or goods employed in conducting the business of the company.* In other words, the property which the company employed in its business.

Within this definition, the word valuation, in the act of 1863, becomes very significant, and manifests an intention on the part of the legislature to treat the capital as property, and to subject it to taxation as such.

It seems to me, therefore, that from these several provisions of the statutes, and from the decisions of the courts, it is obvious that the capital stock of a corporation is the property which it owns, and which it uses in the transaction of its business; and that when the law requires the capital of a corporation to be taxed, it means the property thus owned by it, and which represents the capital; and when it directs the valuation of the stock, the valuation must be regulated by the value of the property so owned, unless another and arbitrary valuation is required to be made.

If I am right in this, then United States stocks owned by the bank at the time an assessment is made are taxed, if the whole capital is taxed without exempting such stocks, in direct violation of the authority of the federal government.

There is nothing in any of the provisions of the tax laws that gives support to the position that the tax upon the capital stock, required by the act of 1863, is in effect a tax on the franchise, or, as Judge NELSON expresses it, a royalty for the grant of the franchise. A franchise is undoubtedly property, and it may be taxed, and it is quite probable that such a tax would not conflict with the constitution or laws of the United States. But I cannot find that any such

tax has ever been assessed in this state, and so radical a change in the system of corporate taxation would not be introduced without clearly manifesting such intention. None has been manifested.

Again, it would be somewhat absurd to assess a bank a gross sum on its franchise and then deduct from it money paid out for real estate and stock held in such corporation by the state and literary and charitable associations. If the legislature had, in the act of 1863, expressly provided that the franchise might be assessed, and then authorized the foregoing deduction, no person could wink so hard as not to see that it was designed as an evasion of the decision of the supreme court of the United States.

I entertain no doubt that the tax assessed on the relator was a tax on the stocks of the United States held by it, and which are exempt from taxation by the constitution and laws of the United States, nor that such tax is unconstitutional and void.

The judgment of the general term should be reversed.

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The People, *ex rel.* The Importers' & Traders' Bank,
*agt.*
The Commissioners of Taxes, &c., of the city of New York.

DENIO, C. J.—In addition to the general question involved in the appeal in the case in which the Bank of the Commonwealth is the relator, the counsel for the appellant in the present case* insists that the act of April 29th, 1863, came too late to affect the assessment in question, which was for the year 1862–3. The time of the performance of the various acts necessary to be done is prescribed in the act of 1857. (Ch. 302.) The deputy commissioners are to commence their duties on the first Monday of September, in each year —in the present instance in September, 1862. (§ 7.) The

* A. R. Dyett, Esq., upon whose argument the question of costs in these cases was raised and decided.

commissioners are to enter in books to be kept by them, the valuation of the taxable property of the several taxpayers, which, it is clearly implied, are to be completed by the second Monday of January, and the books are to be open for examination and correction from that day until the first day of May thereafter, when they are to be closed to enable the commissioners to prepare the assessment rolls. Notice is to be published of the fact of the books being so open for inspection. Persons claiming exemptions or reductions may apply for a correction during the whole of this time, and the commissioners must decide upon the application within thirty days after it is made. (§§ 8 to 10.) The commissioners are authorized to increase or diminish any valuation at any time prior to the closing of the books on the first day of May; but in the case of an increase, after the books are made up, a notice of twenty days must be given to the party affected. (§ 11.) The act of 1863 took effect upon the proceedings just two days before the day fixed for closing the books. If it had been passed at any time after the first day of May, the tax must, I think, have been assessed under the prior law; for it cannot be intended that it was the design of the legislature to undo anything which had been lawfully done under pre-existing laws. And if the assessment actually made by the deputy tax commissioners had *allowed* the exemption claimed on account of the holding of United States securities, instead of disallowing it, I do not see how it could have been increased, because it would have been impossible to have given the twenty days' notice required by the statute, before closing the books. But the return states, in substance, that the deputy commissioners assessed the relator for its whole capital, upon the theory that it was not entitled to an allowance on account of the holding of such stocks, and gave notice of the assessment; whereupon the relator complained, and the commissioners examined the complaint and determined that the assessment was correct, which, it is stated, was done before the first day of May, 1863. It would seem that the commissioners, prior to the passage of the act of 1863, were of opinion that the bank was not enti-

tled to any exemption on account of the United States stock, under the law as it then stood, and that the deputy assessors acted accordingly, so that when that statute was enacted, if it had the general effect which I have attributed to it, in the opinion in the case of the Bank of the Commonwealth, it made the assessment, which, when entered in the books, was questionable, entirely valid. When, therefore, the application for a reduction came to be made, it could not be yielded to, because it then stood precisely as the law makers determined it should be. It would perhaps be well if all legislative acts were made reasonably prospective; but I suppose no doubt can be entertained of the power of the legislature to interfere with such directions, at any time while administrative acts are inchoate and still going on, and that such direction must be followed by the administrative officers. As a matter of construction, we should not consider any new regulations as retrospective in such a way as to affect a matter which had been completed under the former system. I think the act came just in time to deprive the banks of the exemption which they might otherwise have claimed.

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The People, *ex rel.* The Hanover Fire Insurance Company,
*agt.*
The Commissioners of Taxes, &c., of New York.

DENIO, C. J.—In addition to the points made in the other cases heard at the last term, which related to the taxation of the stocks of the United States, the ground is taken, in this case, that the relator, the Hanover Fire Insurance Company, is not embraced in the provisions of the act of April 29, 1863. (Ch. 240.) That corporation was formed for the purpose of making contracts for indemnity against accidental losses by fire, which indemnity was provided for by invested funds and the accruing receipts. The question is, whether it is a *moneyed corporation or association* in the sense

of the statute. The investment of the money which constitutes its capital is incidental to its main business of making insurances. Hence, it is said, that in common parlance it would not be classed with banks, which issue a currency which passes for money, and would not be called a moneyed corporation. But the act certainly means to embrace some companies which are not banks. It would clearly include trust companies, which loan moneys deposited with them upon trust, and this shows that it is not limited to institutions which issue a currency. But an insurance company is rather more remote, and less clearly embraced within the idea conveyed by the adjective *moneyed*, than trust companies. I think we must recur to the Revised Statutes for the meaning of the term. It is defined in title 2, of chapter 18, of the first part of that system. The title is, "of moneyed corporations;" and it contains provisions designed to prevent their insolvency and to regulate the choice of directors. The fifty-first section declares that the term moneyed corporations, *as used in the title*, shall be construed to mean every corporation having banking powers, or having power to make loans upon pledges or deposits, *or authorized by law to make insurances*. 1 R. S., 598.

It is argued that this definition is arbitrary, and was made for a special purpose, and, hence, that it does not indicate a classification or nomenclature for general purposes. The term is used in the statutes in other connections. The safety fund act relates wholly to banks. The first section declares that every moneyed corporation *having banking powers* shall be subject to its provisions. This implying that there are moneyed corporations which have not banking powers.

The eighteenth chapter of the first part of the Revised Statutes is devoted to the subject of the assessment and collection of taxes. The third section of the first title furnishes a definition of personal estate, as used in this chapter. It declares that it includes *stocks* in *moneyed* corporations, and also such portion of the capital of incorporated companies liable to taxation on their capital, as shall not

be invested in real estate. (Vol. 1, 388.) The fourth title of the chapter relates wholly to the taxation of corporations; and the first section declares that "all moneyed or stock corporations, *deriving an income or profit from their capital*, shall be liable to taxation on their capital; and the subsequent provisions distinguish, for taxing purposes, corporations liable to taxation on their capital from those not so liable. This act is in *pari materia* with the act of 1863. I am of opinion that it embraces insurance companies, which, although their principal gains are made by the aggregate of the premiums received above the losses sustained, in other words, by the business of insurance, do yet derive an income from their capital. I think they were assessable on their capital along with banks, while corporations were assessed under their provisions. It has been so decided in this court, in the case of a mutual insurance company, which had no fixed capital. *A fortiori*, this must be so in the present instance, where the relator has a capital of $200,000. *The Mutual Insurance Company of Buffalo* v. *The Supervisors of Erie County* (4 Comst., 442). The act of 1863 being evidently a revival of that mode of assessment, and in *pari materia* with that portion of the Revised Statutes, must be held to embrace, under the name moneyed corporations, companies authorized by law to make insurances.

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The People, *ex rel.* The Bank of Commerce,
*agt.*
The Commissioners of Taxes, &c.

DENIO, C. J.—The question in this case is precisely the same as that involved in the one in which the Bank of the Commonwealth is the relator, and the judgment will therefore be the same.

The cases having the same title as the above, except that other banks were the relators, present precisely the same question as that considered in *The People ex rel. The Bank of the Commonwealth*, and must be determined in the same way. These relators are: The President, &c., of the Bank of

America; The Mercantile Bank; The People's Bank of the City of New York; The Phœnix Bank of the City of New York; The Merchants' Bank of the City of New York; The Merchants' Exchange Bank of the City of New York; The Grocers' Bank of the City of New York; The Shoe and Leather Bank of the City of New York; The Importers, and Traders' Bank; The Tradesman's Bank; The American Exchange Bank; The Ocean Bank; The Union Bank; The Atlantic Bank; The Market Bank; The Irving Bank; The Chatham Bank; The Seventh Ward Bank; The Mechanics' Bank; The Nassau Bank; The Continental Bank; The Hanover Bank; The Oriental Bank; The Bank of the Republic; The Manhattan Company.

In the case in which the Atlantic Bank is relator, the point is made that its capital has been reduced, from which it is argued that the assessment is erroneous in not reducing the assessment. The reduction, however, took effect after May 1, and consequently cannot affect the assessment in question.

The judgment of this court in each of the twenty-eight cases heard was, that so much of the judgment of the supreme court as gave costs to the relators, be reversed, and in all other things such judgment be affirmed.

E. PESHINE SMITH,
*State Reporter.*